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# The TEACH Act's Eligibility Requirements

## GOOD POLICY OR A BAD COMPROMISE?

### I. INTRODUCTION

Imagine that you are a thirty-four year-old adult. Imagine that you work full time while raising two kids. Finally, imagine that in order to get promoted at your job, you are required to pursue a Masters in Business Administration (MBA). How could you possibly find the time to manage all of these responsibilities? The answer for a growing number of adults in this situation is to pursue a degree online. This is the essence of digital distance education: freeing students from the confines of the classroom to pursue “anytime, anyplace, any pace” learning<sup>1</sup> over the Internet.<sup>2</sup>

Now imagine that you have begun an online MBA program through an accredited university. The university advertised the program as being the same as the institution’s traditional in-class, face-to-face MBA program. However, you learn after a few weeks that the instructor for one of your classes is not able to secure a license to display a chart online because the copyright owner charges too much for online dissemination. Finally, you learn that the same chart was shown in the traditional MBA course, because under federal copyright law, no license was needed for face-to-face display in a traditional classroom. You come to realize that the distance education course is not “the same” as the traditional course.

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<sup>1</sup> WEB-BASED EDUC. COMM’N, THE POWER OF THE INTERNET FOR LEARNING 91 (2000), *available at* <http://www.ed.gov/offices/AC/WBEC/FinalReport/WBECReport.pdf> [hereinafter WEB-BASED EDUC. COMM’N REPORT]. “[J]ust 16% of college students fit the traditional 18-22 year old profile, attend full-time, and live on campus.” *Id.* at 4.

<sup>2</sup> Distance education is loosely defined as a form of learning where “students are separated from their instructors by time and/or space.” U.S. Copyright Office, Report on Copyright and Digital Distance Education 10 (1999), *available at* [http://www.copyright.gov/reports/de\\_rpirt.pdf](http://www.copyright.gov/reports/de_rpirt.pdf) [hereinafter COPYRIGHT OFFICE REPORT]. *See also infra* Section II.

This example demonstrates the pressing need for legislation known as the Technology, Education, and Copyright Harmonization Act of 2002, appropriately called the TEACH Act.<sup>3</sup> The Act extends the distance education copyright exemption, which was first enacted in the Copyright Act of 1976,<sup>4</sup> to protect online educators from infringement liability for the unauthorized use of copyrighted works in distance education courses.<sup>5</sup> During the legislative process that led to the passage of the TEACH Act, two groups emerged at the forefront of the debate on the scope of the Act – educators, who generally favored a broad grant of user rights for distance education purposes,<sup>6</sup> and copyright owners, who advocated for a narrow distance education exemption.<sup>7</sup> Thus, the goal of the TEACH Act was to provide legislation that took the interests of both sides into account. On the side of educators, Congress sought to promote the burgeoning field of distance education by granting distance educators free access to the use of copyrighted works in online courses.<sup>8</sup> On the side of copyright

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<sup>3</sup> On November 2, 2002, President George W. Bush signed the TEACH Act into law. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273 § 13301, 116 Stat. 1758, 1910 (2002) (codified at 17 U.S.C.A §§ 110(2), 112(f) (2005) [hereinafter TEACH Act]. The Act essentially rewrote 17 U.S.C. 110(2), the distance education copyright exemption. *See id.* at § 13301(b).

<sup>4</sup> Copyright Act of 1976, Pub. L. No. 94-553 § 110(1), 90 Stat. 2541, 2549 (codified at 17 U.S.C. 110(2) (2000), *amended by* TEACH Act § 13301(b)) [hereinafter Copyright Act of 1976]. The Copyright Act of 1976 enacted two distinct education exemptions: § 110(1) embodies the exemption for traditional in-class face-to-face teaching, while § 110(2) is the distance education exemption. *Id.* at § 110. Taken together, the two provisions were meant to exempt all bona fide educational uses of copyrighted works from infringement liability. COPYRIGHT OFFICE REPORT, *supra* note 2, at 144. Thus, educators who display or perform copyrighted works in the course of normal teaching activities do not need to obtain licenses for that specific use. *Id.*

<sup>5</sup> Under the 1976 Copyright Act, traditional face-to-face educators were exempt from infringement liability for the use of pre-existing copyrighted works in class. Copyright Act of 1976 § 110(1); 17 U.S.C. 110(1) (2000). However, the use of copyrighted works in distance education over the Internet was not covered by the 1976 Act. *See infra* Section III.A.

<sup>6</sup> *See, e.g.*, Comments from the University of Maryland University College to the Copyright Office, Library of Congress 6 (Feb. 5, 1999), <http://www.copyright.gov/disted/comments/init028.pdf> (“[T]here must be a broad exemption for the use of copyrighted works in digital distance education.”) [hereinafter UM Comment].

<sup>7</sup> *See, e.g.*, Comments from the Association of American Publishers to the Copyright Office, Library of Congress 5 (Feb. 5, 1999), <http://www.copyright.gov/disted/comments/init004.pdf> (arguing that if the distance education exemption can be justified at all, it must be restricted to bona fide educational institutions that demonstrate need) [hereinafter AAP Comment].

<sup>8</sup> *See Promoting Technology and Education; Turbo-Charging the School Buses on the Information Highway: Hearing on S. 487 Before the S. Comm. on the Judiciary*, 107th Cong. 5 (2001) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary) [hereinafter *Hearing on S. 487*].

owners, Congress strived to limit the scope of the exemption to bona fide educational purposes.<sup>9</sup>

When Congress first enacted the copyright education exemptions in 1976, it made a policy determination that educators should have free use of copyrighted works for normal teaching activities.<sup>10</sup> This free use, of course, had to be balanced against copyright owners' exclusive right to exploit their works.<sup>11</sup> Thus, the education exemptions were crafted narrowly to ensure that they were only used for bona fide educational purposes.<sup>12</sup> One of the ways Congress narrowed the education exemptions was to limit eligibility to "nonprofit educational institution[s]."<sup>13</sup> More than twenty-five years later, Congress strived to maintain the same balance with the passage of the TEACH Act.<sup>14</sup> However, while the exemption for traditional face-to-face educators remained unchanged under the TEACH Act,<sup>15</sup> the bar for eligibility for distance educators was raised: only "accredited nonprofit educational institution[s]" now qualify for the distance education exemption under federal copyright law.<sup>16</sup>

The fact that Congress narrowed the exemption for distance educators raises the question of whether doing so properly maintains the balance between educators' needs and copyright owners' interests that was struck in the 1976 Act, or whether the additional "accredited" requirement upsets the balance unfairly in favor of copyright owners. During the legislative process that led to the passage of the TEACH Act, both educators and copyright owners agreed that accreditation was necessary to ensure that the newly crafted distance education exemption be limited to bona fide educational purposes.<sup>17</sup> Both sides also agreed that the nonprofit

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<sup>9</sup> See 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch).

<sup>10</sup> See SEN. REP. NO. 107-31, at 4 (2001).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> See REGISTER OF COPYRIGHTS, 89TH CONG., COPYRIGHT LAW REVISION PART 6, at xviii-xix (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS].

<sup>13</sup> 17 U.S.C. §§ 110(1) & (2) (2000), amended by TEACH Act, *supra* note 3, at §13301(b).

<sup>14</sup> See S. REP. NO. 107-31, at 5 (2001).

<sup>15</sup> The TEACH Act did nothing to affect the face-to-face teaching exemption in 17 U.S.C. § 110(1) (2000). See TEACH Act, *supra* note 3, at § 13301(b).

<sup>16</sup> 17 U.S.C.A. § 110(2) (2005) (emphasis added). Compare *id.* with 17 U.S.C. § 110(2) (2000).

<sup>17</sup> See *infra* notes 221-24 and accompanying text.

requirement was meaningless as a dividing line between institutions that qualified for the exemption, and those that did not.<sup>18</sup> Despite this broad based agreement, Congress simply added the “accredited” requirement to the nonprofit limitation without fully examining the policy implications of its decision. The result was to limit the reach and impact of the TEACH Act.<sup>19</sup>

This note will advocate that the TEACH Act failed in its primary goal “to *promote* digital distance learning” because the Act unjustifiably defers to the interests of copyright owners by adding “accredited” to the nonprofit requirement. In order to successfully *promote* distance education, Congress should have removed the “nonprofit” requirement for eligibility,<sup>20</sup> while maintaining only the “accredited” requirement – thus, *all* accredited educational institutions would be eligible for the exemption, whether they are for-profit or not-for-profit.

Section II of this note will provide an overview of digital distance education and its relationship to United States copyright law.<sup>21</sup> Section III will provide crucial background about the distance education exemption and the need for the TEACH Act.<sup>22</sup> Section IV will focus on the legislative process that led to the passage of the TEACH Act, including details of the *Report on Copyright and Digital Distance Education* (“Copyright Office Report”).<sup>23</sup> Section V will examine the debate surrounding the eligibility requirements of the TEACH Act.<sup>24</sup> This note will conclude by arguing that the distance

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<sup>18</sup> *Id.* See also *supra* notes 47-49, 139-44 and accompanying text.

<sup>19</sup> See Kristine H. Hutchinson, Note, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. Rev. 2204, 2206, 2225-27 (2003). By maintaining the nonprofit requirement, the TEACH Act failed to extend the distance education exemption to for-profit institutions that have proven to be more successful in offering distance education courses that meet the needs of underserved populations. See *infra* note 46.

<sup>20</sup> As stated above, “nonprofit” is meaningless as an eligibility criterion because the primary providers of distance education are for-profit educational institutions. Further, many prestigious nonprofit institutions have launched for-profit subsidiaries (though many have failed). See *infra* note 46.

<sup>21</sup> See *infra* Section II.

<sup>22</sup> See *infra* Section III.

<sup>23</sup> COPYRIGHT OFFICE REPORT, *supra* note 2. This report was submitted to Congress in 1999 in response to a previous act passed by Congress. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA]. The DMCA required the Register of Copyrights to examine the field of digital distance education and report back to Congress with recommendations about how to change the distance education exemption to better affect educational policy goals. *Id.* at § 403(a), 112 Stat. at 2889.

<sup>24</sup> See *infra* Section V.B.

education exemption should be amended to include *all* “accredited” educational institutions because public policy favors broad-based support for all distance education programs,<sup>25</sup> the process of accreditation is rigorous enough to protect the economic interests of copyright owners,<sup>26</sup> and the TEACH Act already includes safeguards to protect the interests of copyright owners.<sup>27</sup>

## II. AN OVERVIEW OF DISTANCE EDUCATION

The most fundamental definition of distance education is that it is a form of learning in which “students are separated from their instructors by time and/or space.”<sup>28</sup> This definition is amorphous, covering both asynchronous distance education, where the teaching and learning does not take place in real time, and synchronous distance learning, where technology generally facilitates a live interaction between educators and students.<sup>29</sup> A common characteristic of all distance education courses is that a teacher or mediator is central to the delivery of course content.<sup>30</sup> Increasingly, individual courses include both a traditional face-to-face teaching component and a distance learning component. This is generally called “hybrid” or “blended” learning.<sup>31</sup>

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<sup>25</sup> See *infra* Section II.C.

<sup>26</sup> See *infra* Section V.A.

<sup>27</sup> See *infra* Section IV.B.

<sup>28</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at ii. For the purpose of accreditation review, distance education is defined as “a formal educational process in which the majority of the instruction occurs when student and instructor are not in the same place. Instruction may be synchronous or asynchronous. Distance education may employ correspondence study, or audio, video, or computer technologies.” NAT'L RESEARCH CTR. FOR CAREER AND TECHNICAL EDUC., DISTANCE LEARNING IN POSTSECONDARY CAREER AND TECHNICAL EDUCATION 1 (2003), available at [http://www.nccte.org/publications/infosynthesis/r&dreport/Distance\\_Learning\\_Post\\_CTE/Distance\\_Learning\\_Post\\_CTE.html](http://www.nccte.org/publications/infosynthesis/r&dreport/Distance_Learning_Post_CTE/Distance_Learning_Post_CTE.html) (quoting the North Central Association Commission on Institutions of Higher Education, one of six regional accrediting bodies in the United States).

<sup>29</sup> See COPYRIGHT OFFICE REPORT, *supra* note 2, at 15-16. Traditionally, asynchronous distance education courses were conducted via mail correspondence and videotape. Today, asynchronous distance education usually refers to the use of technologies such as email, threaded discussion boards, and online web courses, while synchronous distance education usually refers to the use of applications such as instant messaging and streaming audio and video. *Id.* at 16.

<sup>30</sup> *Id.* at 10. In its report, the Copyright Office distinguished teacher-centered learning modules from unstructured or self-paced learning modules. Thus, the term “distance education” specifically *excludes* self-paced modules. See *id.*

<sup>31</sup> H.R. REP. NO. 107-687, at 2 (2002); S. REP. NO. 107-31, at 4 (2001) (explaining that “hybrid” distance learning courses are those in which students meet both in a traditional classroom and online in a virtual classroom).

### A. *Distance Education Over the Internet*

This note will focus on the delivery of distance education courses over the Internet.<sup>32</sup> The Internet has quickly become the most widely used distance education tool because it enables institutions to provide the most cost-effective delivery of distance education courses to the widest possible audience.<sup>33</sup> Additionally, by creating “anywhere, anytime” virtual classrooms, online education offers students flexible and convenient options for pursuing advanced degrees.<sup>34</sup> This has led policymakers to conclude that “online learning has revolutionized the world of ‘distance learning.’”<sup>35</sup>

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<sup>32</sup> For the purposes of this note, distance learning over the Internet will be referred to as either “online learning” or, more technically, “digital distance education.” While there is no “typical” online course, a wide range of applications have been developed to connect students to institutions via the Internet. At the simplest level, instructors communicate with their students asynchronously, using email, threaded discussion boards, interactive CD-ROMs, and course management systems, such as Blackboard and WebCT. At the more sophisticated level, instructors use synchronous or real-time methods of instruction, such as instant messaging, audio and video streaming (also known as webcasting), application sharing, and even two-way video-conferencing. See COPYRIGHT OFFICE REPORT, *supra* note 2, at 53-57.

<sup>33</sup> For the 1999-2000 academic year, sixty percent of undergraduate students and sixty-seven percent of graduate students who participated in distance education courses did so via the Internet. This number is only expected to grow. ANNA C. SIKORA, U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, A PROFILE OF PARTICIPATION IN DISTANCE EDUCATION: 1999-2000, at 21-22 (2002), <http://nces.ed.gov/pubs2003/2003154.pdf>.

<sup>34</sup> See Hutchinson, *supra* note 19, at 2208. For example, OnlineLearning.net provides teachers with online professional development courses that can lead to a master’s degree. Courses are generally targeted to working adults who may not have the time to attend traditional face-to-face classes.

Come to class whenever it’s convenient for you by choosing when and where you participate in class. Your course is conducted according to a schedule, but there are no “live” classes to attend. Instead, lectures, coursework, and discussions all take place at your convenience. You choose the place – at home, at school – wherever you have access to a computer, modem, and an Internet Service Provider (ISP).

OnlineLearning website, *How Online Learning Works*, <http://www.onlinelearning.net/> (last visited Oct. 25, 2005).

<sup>35</sup> 147 CONG. REC. S2006, S2007 (daily ed. March 7, 2001) (statement of Sen. Hatch). In the future, increased access to broadband Internet services will continue to stimulate innovation in online learning technologies. Advanced online learning technologies, such as webcasting and application sharing require high-speed Internet connections. As more Americans go online with broadband access, more distance learners will be able to take advantage of these technologies. See U.S. DEP’T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 4 (2004), <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf> [hereinafter A NATION ONLINE] (showing that while only 4.4% of U.S. households had broadband access in 2000, this number had grown to 19.9% by 2003).

Distance education programs are vital to the communities they serve. This is because online learning targets underserved populations and non-traditional students, such as working adults,<sup>36</sup> students in rural areas,<sup>37</sup> students with physical disabilities,<sup>38</sup> and students for whom traditional liberal arts education is ill-suited.<sup>39</sup> In other words, “distance education helps students overcome such barriers as full-time work commitments, geographic inaccessibility, [] the difficulty of obtaining child or elder-care, and physical disabilities.”<sup>40</sup> The importance of distance education to its target recipients cannot be understated. This is because for many people who strive for “lifelong learning,” distance learning is the *only* means of achieving their goal.<sup>41</sup> Precisely because of the niche that distance education courses serve, the number of students participating in various programs nationwide continues to grow. During the 1999-2000 academic year, fully eight percent of undergraduate and ten percent of graduate students

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<sup>36</sup> For instance, the mission of the University of Phoenix, the largest provider of online education, is to “provide high quality education to working adult students . . . regardless of their geographical location.” University of Phoenix, Mission, <http://online.phoenix.edu/mission.asp> (last visited Oct. 25, 2005). See also Dan Carnevale, *Distance Education Attracts Older Women Who Have Families and Jobs, Study Finds*, CHRON. OF HIGHER EDUC., Nov. 8, 2002, at 33 (reporting that online courses are advertised as being ideal for single working mothers). Recent studies have revealed that adult learners are the fastest growing segment of students in higher education. WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 4 (noting that “just 16% of college students fit the traditional 18-22 year old profile”).

<sup>37</sup> For example, due to the rise in online courses, “[s]tudents in the remote areas of [Utah] are now able to link up to resources previously only available to those in cities or at prestigious educational institutions.” 147 CONG. REC. S2006, S2007 (daily ed. March 7, 2001) (statement of Sen. Hatch).

<sup>38</sup> According to Rep. Peter Hoekstra (R-MI), “The flexibility and access facilitated through distance education and electronic delivery methods also holds tremendous promise for eliminating barriers and expanding access to higher education for students with disabilities – a population whose access to higher education may be somewhat limited by restraints on their hearing, sight, or mobility.” Dan Carnevale, *Congress May Boost Online Programs That Aid Students Who Have Disabilities*, CHRON. OF HIGHER EDUC., Nov. 28, 2003, at 34. See also Sheryl Burgstahler, *Bridging the Digital Divide in Postsecondary Education: Technology Access for Youth with Disabilities*, INFORMATION BRIEF (Nat’l Ctr. on Secondary Educ. and Transition, Minneapolis, Minn.), Dec. 2002, at 1, [http://www.ncset.org/publications/info/NCSETInfoBrief\\_1.2.pdf](http://www.ncset.org/publications/info/NCSETInfoBrief_1.2.pdf) (the benefits of technology are even greater for those with disabilities).

<sup>39</sup> S. REP. NO. 107-31, at 4 (2001); 147 CONG. REC. S5988 (daily ed. June 7, 2001) (statement of Sen. Leahy). Shy students, who may be unwilling to participate in traditional face-to-face courses, may be more willing to participate in online discussions “because the format diminishes the intimidation that they feel speaking in front of a large group of their peers.” Hutchinson, *supra* note 19, at 2210.

<sup>40</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 19.

<sup>41</sup> 147 CONG. REC. S5988 (daily ed. June 7, 2001) (statement of Sen. Leahy).



reported that they had participated in some type of distance education course.<sup>42</sup>

The increased demand for distance education courses has triggered a reciprocal growth in the number of distance education providers.<sup>43</sup> Not surprisingly, this growth has tracked the rise of Americans' access to the Internet.<sup>44</sup> In other words, as more Americans have gone online, more people have begun taking online classes, and more institutions have started offering distance education courses.<sup>45</sup> Because of its continued growth, online education is now perceived as a potentially lucrative market for both nonprofit and for-profit institutions.<sup>46</sup> While nonprofit two and four-year institutions may have once dominated the education market, online courses are now offered by "both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, and through varieties of

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<sup>42</sup> SIKORA, *supra* note 33, at 9, 14.

<sup>43</sup> During the 1997-98 academic year, thirty-four percent of two-year and four-year postsecondary institutions offered distance education courses. LAURIE LEWIS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, DISTANCE EDUCATION AT POSTSECONDARY EDUCATION INSTITUTIONS: 1997-98, at 12 (1999), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003051>. By 2001, fifty-six percent of all two-year and four-year accredited institutions offered distance education courses. This number was expected to grow to at least sixty-eight percent by 2004. E.D. TABS, NAT'L CTR. FOR EDUC. STATISTICS, DISTANCE EDUCATION AT DEGREE-GRANTING POSTSECONDARY INSTITUTIONS: 2000-01, at 3-4 (2003), available at <http://nces.ed.gov/surveys/peqis/publications/2003017/>.

<sup>44</sup> In 1998, only 26.2% of U.S. households had Internet access. By 2003, over fifty percent of U.S. households were online. A NATION ONLINE, *supra* note 35, at 4.

<sup>45</sup> See TABS, *supra* note 43, at 4.

<sup>46</sup> In fact, growing evidence suggests that for-profit institutions are even more successful at providing distance education courses than their nonprofit counterparts. Today, the largest provider of distance education is the for-profit University of Phoenix, which saw enrollments rise to over 200,000 in 2002. Goldie Blumenstyk, *For-Profit Colleges: Growth at Home and Abroad*, CHRON. OF HIGHER EDUC., Dec. 19, 2003, at 12 ("According to analysts, enrollment growth at the seven biggest for-profit companies has outpaced overall enrollment growth in higher education for at least the last half-dozen years." The result is that many for-profit institutions are "flourishing," even though "cuts in state aid and philanthropy have put the squeeze on community colleges, state universities, and traditional private institutions."). In the late 1990s and early 2000s, many prestigious traditional institutions, such as New York University, Columbia University, the University of Maryland, and Temple University, established for-profit subsidiaries that offered distance education courses. "The notion was that there were prospective students out there, far beyond the university's walls, for whom distance education was the answer." Katie Hafner, *Lessons Learned At Dot-Com U.*, N.Y. TIMES, May 2, 2002, at G1. These institutions believed that if they offered courses over the Internet, students would come – and be willing to pay their high tuition costs. *Id.* Unfortunately for many of these schools, the reality was that most students who enroll in distance education courses are not looking for an "Ivy League" experience, but rather low-cost, accessible education. Today, many of these for-profit subsidiaries have ceased operations. The ones that are left tend to offer free courses that are meant to entice customers to enroll at the institution. *Id.*

partnerships involving both educational institutions and corporations.”<sup>47</sup> Thus, the line between nonprofit and for-profit distance educators has blurred because both types of institutions now offer accredited, online courses.<sup>48</sup> This is precisely why “nonprofit” is no longer a meaningful dividing line between those institutions that qualify for the distance education exemption, and those that do not.<sup>49</sup> Since both types of institutions are providing valuable distance learning services and courses, public policy should be shaped to incentivize both types of institutions to offer rich course content. This is just one of the reasons that Congress erred by retaining the nonprofit requirement for the distance education exemption.

### B. *Distance Education and Copyright Law*

Congress has long recognized that educational uses of copyrighted works should be exempt from infringement liability.<sup>50</sup> Copyright laws strike a balance between an author’s exclusive right to exploit his or her work, and the public’s need to have access to that work.<sup>51</sup> Thus, Congress has provided for an education exemption because the public’s interest in free access to copyrighted works for educational purposes (such as displaying maps in a geography class, or playing music clips in a music appreciation class) outweighs the author’s right to exploit that work.<sup>52</sup> For traditional classroom courses, the

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<sup>47</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 20-21.

<sup>48</sup> *Id.*; see AAP Comment, *supra* note 7, at 5.

<sup>49</sup> See *infra* notes 141-44, 221-24 and accompanying text.

<sup>50</sup> For example, under the 1909 Copyright Act, the unauthorized public performance of a musical or nondramatic literary work was exempt from copyright infringement liability, unless it was for-profit. This exemption was justified, at least in part, because “it was thought that to prohibit unlicensed nonprofit performances of musical and nondramatic literary works in such public places as schools and churches would constitute undue restriction on the benefits that should be available to the public.” MELVILLE B. NIMMER, 2 NIMMER ON COPYRIGHT § 8.15 (2004) [hereinafter NIMMER ON COPYRIGHT]. Under the 1976 Copyright Act, the for-profit distinction was discarded. Instead, the public performance and display rights were broadly granted to copyright owners, while the education exemption was narrowly drafted. See SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 12, at xviii, 31-37; see also 17 U.S.C. §§106, 110(1) (2000).

<sup>51</sup> See, e.g., DMCA, *supra* note 23 (Register of Copyrights “shall submit to Congress recommendations on how to promote distance education through digital technologies . . . while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.”); S. REP. NO. 107-31, at 5 (2001).

<sup>52</sup> SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 12, at 35; COPYRIGHT OFFICE REPORT, *supra* note 2, at 144 (“The exemptions in sections 110(1) and (2) embody a policy determination that certain uses of copyrighted works in

“display” or “performance” of all types of copyrighted works during the course of “face-to-face teaching activities” is exempt from liability.<sup>53</sup> For distance education courses prior to the passage of the TEACH Act, only the “performance” or “display” of a “nondramatic literary or musical work” during an educational broadcast was exempt from liability, subject to a number of other eligibility requirements.<sup>54</sup>

The distance education exemption has always been more limited than the face-to-face exemption because the dissemination and transmission of copyrighted works (as opposed to the mere “display” of such works) poses a substantially greater risk of copyright piracy.<sup>55</sup> The threat of copyright piracy is especially acute after the passage of the TEACH Act because now copyright owners must be concerned with the nearly unlimited ability of students to disseminate copyrighted works over the Internet.<sup>56</sup> Nonetheless, with the passage of the TEACH Act, Congress determined that the need of distance educators and students taking online classes to secure free access to copyrighted works outweighed the heightened risks to copyright owners.<sup>57</sup>

The legislative goal of the TEACH Act was simple: to promote the burgeoning field of online education through favorable copyright policies without running afoul of the rights of copyright owners.<sup>58</sup> The passage of the TEACH Act was the result of a variety of legislative forces that came together in the early 2000s.<sup>59</sup> In 1999, the Copyright Office published its report calling for reform to the distance education copyright exemption.<sup>60</sup> Then, in 2000, the Web-Based Commission to the

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connection with instruction should be permitted without the need to obtain a license or rely on fair use.”).

<sup>53</sup> 17 U.S.C. § 110(1) (2000).

<sup>54</sup> 17 U.S.C. § 110(2) (2000).

<sup>55</sup> “When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to friends and acquaintances around the world.” COPYRIGHT OFFICE REPORT, *supra* note 2, at 132. See also *Hearing on S. 487*, *supra* note 8, at 11 (statement of Marybeth Peters, Register of Copyrights).

<sup>56</sup> See S. REP. NO. 107-31, at 5 (2001).

<sup>57</sup> However, in the TEACH Act, Congress implemented a number of safeguards to protect the interests of copyright owners. These safeguards will be discussed in detail, notes *infra* 156-68 and the accompanying text.

<sup>58</sup> See 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch) (statement made upon introduction of the bill); DMCA, *supra* note 23 (precursor to TEACH Act).

<sup>59</sup> See generally 147 CONG. REC. S2006 (statements of Sen. Hatch and Sen. Leahy).

<sup>60</sup> See COPYRIGHT OFFICE REPORT, *supra* note 2, at 145.

President and the Congress<sup>61</sup> issued a “call to action” for policymakers to aggressively enact legislation that would promote distance learning in America.<sup>62</sup> As part of its findings, the Commission identified that the distance education copyright exemption had fallen out-of-step with modern advances in technology and acted as an impediment to the development of online education.<sup>63</sup> Thus, the TEACH Act, which brought the distance education exemption up to date with modern technology, was a direct response to the Commission’s call to action.<sup>64</sup> However, the TEACH Act did not go far enough to meet the needs of distance educators. Because the TEACH Act does not exempt accredited for-profit universities, it fails to reach the most successful providers of distance education courses.<sup>65</sup> Further, because of six additional eligibility requirements within the Act,<sup>66</sup> some accredited nonprofit institutions have also elected not to take advantage of the exemption.<sup>67</sup>

### C. *Strong Public Policy Supporting Distance Education*

Distance education is valuable to American society because this country’s ability to compete in an increasingly global marketplace is directly related to the quality and availability of higher education.

Education is the means by which we develop our nation’s human resources. In this information age, marked by both cooperation and

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<sup>61</sup> The mission of the Commission was to “discover how the Internet is being used to enhance learning opportunity, and to identify ways that Congress and the President can help local schools, state education agencies, and postsecondary institutions overcome barriers.” WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 2.

<sup>62</sup> *Id.* at iii. Among other things, the Commission called for Congress to “revise outdated regulations that impede[d] innovation and replace them with approaches that embrace anytime, anywhere, any pace learning.” *Id.* at iv. The Commission believed that the time was ripe for a national mobilization in support of distance education that was on par with other great American efforts, such as the race to the moon, and finding a cure for polio. *Id.* at 127.

<sup>63</sup> *Id.* at 95-96.

<sup>64</sup> See 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch) (“[I]n its recent report, the Web-Based Commission, established by Congress to develop policies to ensure that new technologies will enhance learning, concluded that United States copyright practice presents significant impediments to online education.”).

<sup>65</sup> See *supra* note 46.

<sup>66</sup> See *infra* notes 156-68 and accompanying text.

<sup>67</sup> See Dan Carnevale, *Western Washington U. Will Eschew Protection of New Copyright Law*, CHRON. OF HIGHER EDUC., Mar. 5, 2004, at 28.

competition on a global scale, the ability of the United States to meet its domestic and international challenges and responsibilities is directly dependent on its educational capacity. That capacity in turn will be determined by the quality of our educational programs and their reach to all sectors of the public. For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.<sup>68</sup>

In other words, for America to raise the standard of living domestically, and to compete globally, policies promoting online education must be enacted to ensure that underserved populations have access to higher education.<sup>69</sup>

The development of distance education is also crucial to bridging the “digital divide” in America<sup>70</sup> because online courses successfully target underserved populations.<sup>71</sup> Recent evidence has linked the rise in the number of distance education courses being offered to increased enrollment in postsecondary institutions overall.<sup>72</sup> Further evidence suggests that many students enrolling in distance education programs would not otherwise be able to pursue a postsecondary degree if not for the convenience of online programs.<sup>73</sup> Taken together, this evidence reveals that distance education is working to

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<sup>68</sup> S. REP. NO. 107-31, at 3-4 (2001); H.R. REP. NO. 107-687, at 2 (2002).

<sup>69</sup> For example, recent legislation has been introduced to eliminate rules that prevent for-profit institutions from offering financial aid to students who choose to pursue an online degree. See College Access and Opportunity Act of 2005, H.R. 609, 109th Cong. § 482(a) (2005). See also EUNICE N. ASKOV ET AL., NAT’L CTR. FOR THE STUDY OF ADULT LEARNING AND LITERACY, EXPANDING ACCESS TO ADULT LITERACY WITH ONLINE DISTANCE EDUCATION 1 (2003), available at [http://ncsall.gse.harvard.edu/research/op\\_askov.pdf](http://ncsall.gse.harvard.edu/research/op_askov.pdf) (“In the U.S. economy, education and training are keys to economic survival.”).

<sup>70</sup> The term “digital divide” refers to the “socio-economic gap between communities that have access to computers and the Internet and those who do not.” *Id.* Though the exact origin of the term is unknown, it can be traced back to the 1990s, when it was popularized by Bill Clinton and Al Gore. Wikipedia, *Digital Divide*, [http://en.wikipedia.org/wiki/Digital\\_divide](http://en.wikipedia.org/wiki/Digital_divide) (last modified Dec. 26, 2004). For a discussion of the “digital divide” in the context of distance education, see generally the report of the NAT’L POSTSECONDARY EDUC. COOP., HOW DOES TECHNOLOGY AFFECT ACCESS TO POSTSECONDARY EDUCATION? WHAT DO WE REALLY KNOW? (2004), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2004831>.

<sup>71</sup> See *supra* notes 36-41 and accompanying text.

<sup>72</sup> NAT’L POSTSECONDARY EDUC. COOP., *supra* note 70, at 5. For example, a study of recent efforts to increase enrollment in distance education courses in Virginia revealed that enrollment in public postsecondary institutions increased by 3.3% overall during the studied period. *Id.*

<sup>73</sup> *Id.* at 5, 35.

improve access to higher education.<sup>74</sup> This evidence also suggests that those who enroll in online programs are not those who may have otherwise attended traditional universities. Instead, students taking online courses are increasingly those who never before had the opportunity to pursue advanced degrees.<sup>75</sup> For purposes of this note, the relevant part of this discussion is that both nonprofit and for-profit distance educators offer similar benefits to their underserved target audiences. Thus, there is no reason why the distance education copyright exemption should distinguish between the two.

### III. THE TEACH ACT: THE NEED FOR A CHANGE IN THE LAW

In its report, the Web-Based Commission concluded that copyright law prior to the passage of TEACH Act acted as an impediment to the development of online education.<sup>76</sup> This assessment was partially based on the Commission's findings that institutions face enormous start-up costs when they establish distance education programs.<sup>77</sup> These costs include building the technological infrastructure to handle courses delivered over the Internet, supporting professors teaching online, and licensing copyrighted works to use in online courses.<sup>78</sup> All of these costs act as a barrier to entry for institutions that seek to establish online programs.<sup>79</sup> In one well-known example, New York University was prepared to spend \$600,000 in an effort to bring its highly ranked cinema program online. A significant portion of the funds was allocated to license film clips, from five to thirty seconds in

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<sup>74</sup> See Blumenstyk, *supra* note 46, at 12.

<sup>75</sup> *Id.* ("For the most part, say analysts, the growth of the for-profit sector has not come at the expense of traditional colleges. The reason is two-fold. First, the number of high-school graduates is growing. Second, many for-profit institutions have fueled their growth by serving nontraditional students.") (emphasis added).

<sup>76</sup> WEB-BASED EDUC. COMM'N REPORT, *supra* note 1, at 95-96.

<sup>77</sup> See *id.* at 76 (explaining that creating an online course can take anywhere from 66-500% longer than creating a traditional face-to-face course); Hafner, *supra* note 46, at G1 ("It costs hundreds of thousands of dollars to build a [distance education] course well.").

<sup>78</sup> Hutchinson, *supra* note 19, at 2211-12. "In fact, securing the rights to use copyrighted materials has proven to be one of the highest costs of providing high quality online education." *Id.*

<sup>79</sup> *Hearing on S. 487*, *supra* note 8, at 19 (statement of Gerald A. Heeger, President, University of Maryland University College). "Although digital distance education may in the future produce genuine economies, in the short run the start-up and delivery costs are very expensive, so that all institutions are limited by cost in what they can do, and some institutions are simply kept out of significant digital education activities because of its steep costs." *Id.*

length. Unfortunately, negotiations for the clips went on indefinitely, and the program never got off the ground.<sup>80</sup>

This example illustrates two stark realities confronting digital distance education. First, it is very expensive. . . . The second reality . . . is that even if we find the resources to build the necessary infrastructure, digital education will be threatened with second-class status unless and until local and remote educational content are brought into closer accord. The inescapable fact is that for digital distance education to achieve its full potential, instructors must be able to conduct remotely all educational activities permitted in a physical classroom.<sup>81</sup>

Thus, the TEACH Act was needed not only to bring the distance education exemption into the modern age,<sup>82</sup> but also to grant distance educators similar rights to use copyrighted works as their face-to-face teaching counterparts.<sup>83</sup> While face-to-face educators could rely on a statutory exemption to display and perform copyrighted works in class, prior to the TEACH Act, online educators had to rely on expensive licenses that copyright owners were generally unwilling to grant.<sup>84</sup>

A. *The Pre-TEACH Distance Education Did Not Exempt Online Courses from Copyright Infringement Liability*

The pre-TEACH distance education exemption drafted for the 1976 Copyright Act contemplated distance education over open and closed-circuit educational networks, which generally referred to televisions in classrooms that received instructional broadcasts.<sup>85</sup> Under the 1976 Act, the distance education exemption was limited to the “display” of any work<sup>86</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See WEB-BASED EDUC. COMM'N REPORT, *supra* note 1, at 95-96; 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch); see also *infra* note 91 and accompanying text.

<sup>83</sup> See *Hearing on S. 487*, *supra* note 8, at 5 (statement of Sen. Leahy, Member Sen. Comm. on the Judiciary).

<sup>84</sup> See *id.* at 19-20 (statement of Gerald A. Heeger, President, University of Maryland University College); Hutchinson, *supra* note 19, at 2212-13 (“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, under § 110(2),” teachers of online courses must secure expensive licenses to display or perform such works.)

<sup>85</sup> See H.R. REP. NO. 94-1476, at 82-83 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5697 (referring to the distance education exemption as the “instructional broadcasting” exemption); NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C)(1)(d)(i).

<sup>86</sup> The “display” right, one of the author’s exclusive rights under federal copyright law, is limited to the types of creative works one might ordinarily want to show to others, such as “literary, musical, dramatic, and choreographic works,

or the “performance” of a “nondramatic literary or musical work”<sup>87</sup> in the course of a “transmission” to a nonprofit educational institution.<sup>88</sup> In other words, under the old law, distance educators could not “perform” dramatic works, motion pictures, or other audiovisual works, whereas their face-to-face teaching counterparts could.<sup>89</sup> Additionally, only a “transmission” directed at classrooms or to individual students with disabilities or special needs was exempt under the 1976 Act.<sup>90</sup>

By the late 1990s, distance educators could not seek shelter under the 1976 distance education exemption because the old law had fallen out of step with new technology.<sup>91</sup> First, the dissemination of copyrighted works over the Internet invokes both the “reproduction”<sup>92</sup> and “distribution”<sup>93</sup> rights of the copyright owner, which were not exempt under the 1976

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pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.” 17 U.S.C. § 106(5) (2000). Under the 1976 Copyright Act, 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.” 17 U.S.C. § 101 (2000).

<sup>87</sup> The author’s exclusive right to “perform” his or her work is more limited than the author’s other exclusive rights and extends only to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” 17 U.S.C. § 106(4) (2000). Notably, the exclusive right to perform a creative work only extends to sound recordings that are performed via digital audio transmission. This language is broad enough to *exclude* the unauthorized use of music recordings in online courses. *See* 17 U.S.C. § 106(6) (2000).

<sup>88</sup> 17 U.S.C. § 110(2) (2000).

<sup>89</sup> NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C)(1)(b). Professor Nimmer also points out that “although a straight reading of a nondramatic literary work, such as a novel, would be subject to the exemption [under the 1976 Act], an acting out of the novel in dramatic form would not be exempt.” *Id.*

<sup>90</sup> 17 U.S.C. § 110(2) (2000). *See* NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C)(1)(d).

<sup>91</sup> *See* 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch) (“Currently, United States copyright law contains a number of exemptions to copyright owners’ rights relating to face-to-face teaching and instructional broadcasts. While these exemptions embody the policy that certain uses of copyrighted works for instructional purposes should be exempt from copyright control, the current exemptions were not drafted with online, interactive digital technologies in mind.”); Hutchinson, *supra* note 19, at 2212-13 (“Prior to the passage of the TEACH Act, there was no specific statutory exception that covered uses of copyrighted works for online education.”).

<sup>92</sup> The reproduction right is invoked any time a copy is made of copyrighted work. 17 U.S.C. § 106(1) (2000).

<sup>93</sup> 17 U.S.C. § 106(3) (2000). An author has the exclusive right to control “publication” or “distribution” of copies of a copyrighted work. However, “a public performance or display of the work does not itself constitute a publication.” 17 U.S.C. § 101 (2000).



Act.<sup>94</sup> Second, while the 1976 exemption contemplated educational transmissions directed at classrooms and students with special needs, online education targets all students regardless of geographic location or need.<sup>95</sup> Thus, the old law was too narrowly crafted to be useful to online educators.

*B. Fair Use and Licensing Were Not Viable Alternatives to a Specific Statutory Exemption*

Prior to the passage of the TEACH Act, distance educators who wished to transmit copyrighted works via the Internet would have had to rely on fair use<sup>96</sup> or licenses<sup>97</sup> to protect themselves from infringement liability. However, neither of these options were acceptable alternatives to a specific statutory exemption for online educators.<sup>98</sup> Fair use is an equitable defense that is inexact by definition.<sup>99</sup> Thus, to determine whether the use of a copyrighted work is “fair,” courts must weigh that use in light of four statutory factors.<sup>100</sup>

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<sup>94</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 83. Digital transmissions implicate the distribution right because the work is actually transmitted to the end-user. The reproduction right is implicated when copies of transmitted works are cached in the temporary memory of a computer or web-server. *See Hearing on S. 487, supra* note 8, at 11-12 (statement of Marybeth Peters, Register of Copyrights).

<sup>95</sup> *See supra* notes 34-41 and accompanying text.

<sup>96</sup> 17 U.S.C. § 107 (2000). Fair use is one of the exemptions intended to benefit educational uses of copyrighted works, though fair use is broad enough to cover all types of uses, whether for educational purposes or not. COPYRIGHT OFFICE REPORT, *supra* note 2, at 85.

<sup>97</sup> “The essential principle of ‘licensing’ rights, which is critical to the practical exercise of copyright ownership . . . works well for producers and users . . . and has been contemporaneously reaffirmed by the courts as a legitimate exercise of copyright.” AAP Comment, *supra* note 7, at 2.

<sup>98</sup> *See generally* UM Comment, *supra* note 6; American Library Association et al. Reply Comment to the Copyright Office 4, available at <http://www.copyright.gov/disted/reply/> (last visited Feb. 21, 2006) [hereinafter ALA Reply Comment].

<sup>99</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Stuart v. Abend*, 495 U.S. 207, 236 (1990).

<sup>100</sup> The Supreme Court has held that there is no bright line test for fair use, and thus claims must be adjudicated on a case-by-case basis. *Campbell*, 510 U.S. at 577. The four statutory factors are:

- (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.

17 U.S.C. § 107 (2000).

While at least one of the factors, “the purpose and character of the use,” weighs strongly in favor of nonprofit educational uses,<sup>101</sup> at least one other factor, “the effect of the use upon the potential market,” may weigh against the dissemination of copyrighted works over digital networks, even for nonprofit institutions.<sup>102</sup> Further, fair use probably does not protect the unauthorized use of copyrighted works by for-profit providers of distance education, who represent a significant portion of the distance education market.<sup>103</sup> Thus, because of the inexact and undefined nature of fair use, it is not a viable alternative to a specific statutory exemption for distance educators.<sup>104</sup>

Reliance on licenses is also not an acceptable option for educators who want to provide rich content for their online programs.<sup>105</sup> The first problem with licensing is that copyright owners are reluctant to license their works for dissemination over the Internet and usually require excessive fees for doing

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<sup>101</sup> 17 U.S.C. § 107(1) (2000). However, this factor weighs against for-profit providers who may have the exact same need as nonprofit educators to use the copyrighted work. Even for nonprofit educators, this factor is not dispositive because it is only one factor that courts must weigh.

<sup>102</sup> 17 U.S.C. § 107(4) (2000). The Supreme Court has ruled that this is the most important of the four factors. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) (the fourth factor is “undoubtedly the single most important element of fair use”). The concern here is the perceived unfairness of allowing a work to be disseminated over a digital network, which “could alter a court’s evaluation of this factor” in relation to online educational uses. COPYRIGHT OFFICE REPORT, *supra* note 2, at 90.

<sup>103</sup> See *supra* note 46.

<sup>104</sup> See COPYRIGHT OFFICE REPORT, *supra* note 2, at 130; UM Comment, *supra* note 6, at 6-7 (“the ‘fair use’ guidelines cannot substitute for the current exemption”); ALA Reply Comment, *supra* note 98, at 4 (“a fair use dependent regulatory regime would . . . produce the chilling effect of substantial contingent liability for all distance education endeavors”).

<sup>105</sup> For a poignant critique of the problems with licensing copyrighted works for online courses, see the comments made by Gerald Heeger, President, University of Maryland, to the Senate Committee on the Judiciary during the TEACH Act hearings:

Licensing is not the solution to copyright barriers. Licensing the use of content is slow, costly, and does not permit the instructor freedom in the selection of materials for transmission in the digital classroom. Further, there is a misperception that an online course is developed in advance, so getting permissions is reasonable and possible. However, in reality, that is not the case. Faculty members frequently supplement the “core” course materials “on the fly” and need flexibility to do so. Requiring licenses will limit the freedom for distance education faculty to use materials essential to the learning process. Provided that there are proper safeguards, the online environment should not be more restricted than the face-to-face teaching environment.

*Hearing on S. 487, supra* note 8, at 20.

so.<sup>106</sup> Second, educators often have a difficult time tracking down copyright owners.<sup>107</sup> This leads to lengthy delays in the licensing process.<sup>108</sup> In some cases, online educators must forego their plans to use copyrighted content altogether.<sup>109</sup> Thus, the overall effect is that for the exact same class, online educators are not able to provide the same rich content as their face-to-face counterparts, who are not required to license works for “performance” or “display.”<sup>110</sup> This disparity, prior to the passage of the TEACH Act, led many commentators and critics to assert that online educators were treated like second-class citizens.<sup>111</sup>

#### IV. THE TEACH ACT: HOW THE ACT ADDRESSED THE NEED FOR CHANGE

Congress first addressed the shortcomings of the distance education exemption as part of the sweeping Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>112</sup> While the time

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<sup>106</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 43. “Charges for digital uses of material are often significantly higher than comparable licenses for analog uses . . . .” *Id.* In other words, copyright owners charge higher fees to transmit works via the Internet than they would for face-to-face display. *See id.*

<sup>107</sup> *Id.* at 42 (explaining that in some circumstances, it can be “impossible to locate the copyright owner”).

<sup>108</sup> *See* Hutchinson, *supra* note 19, at 2214 (noting that the delay involved in the licensing process “can be prohibitive”); COPYRIGHT OFFICE REPORT, *supra* note 2, at 42.

<sup>109</sup> *Hearing on S. 487*, *supra* note 8, at 19 (statement of Gerald A. Heeger, President, University of Maryland University College) (telling the story of the online cinema class that failed to get off the ground due to excessive licensing fees and delays).

<sup>110</sup> Going back to the Introduction of this note, this was exactly the problem for *all* online educators prior to the passage of the TEACH Act. *See supra* Section I. *See also* Hutchinson, *supra* note 19, at 2215 (“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.”).

<sup>111</sup> *Hearing on S. 487*, *supra* note 8, at 19 (statement of Gerald A. Heeger, President, University of Maryland University College) (“digital education will be threatened with second-class status unless and until local and remote educational content are brought into closer accord”); Thomas A. Lipinski, *Legal Reform in the Electronic Age: Analysis and Critique of the Construction and Operation of S. 487, The Technology, Education and Copyright Harmonization (TEACH) Act of 2001*, 2003 BYU Educ. & L.J. 95, 97 (2003) (arguing that even after the passage of the TEACH Act, online educators maintain a “somewhat ‘lesser citizen’ status” compared to their face-to-face counterparts); Hutchinson, *supra* note 19, at 2215.

<sup>112</sup> DMCA, *supra* note 23, at § 403(a). Bills were introduced in 1997 that would have amended 17 U.S.C. § 110(2) (the distance education exemption) to allow for

was not ripe in 1998 to amend the distance education exemption,<sup>113</sup> Congress did order the Register of Copyrights to study the field of digital distance education and report back to it with recommendations.<sup>114</sup> The broad question for the Register to answer was whether the current law should be changed, freeing distance educators to use unauthorized copyrighted works in online courses.<sup>115</sup> A secondary issue was for the Register to recommend which parties should benefit from a change in the law.<sup>116</sup>

#### A. *The Copyright Office Report on Digital Distance Education*

The Register of Copyrights conducted an extensive series of hearings during the course of its study.<sup>117</sup> Throughout the process, the Register strived to give voice to all the parties that would be affected by the potential legislation.<sup>118</sup> These parties included copyright owners,<sup>119</sup> educators,<sup>120</sup> digital rights

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the distribution of copyrighted works in distance education courses. *See, e.g.*, Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. § 5(b) (1997).

<sup>113</sup> “The Committee believes that the scope of the distance education exemption should be re-examined in light of the range of educational activities made possible by digital technologies.” S. REP. NO. 105-190, at 23 (1998).

<sup>114</sup> DMCA, *supra* note 23, at § 403(a). Under the DMCA, the Register of Copyrights was to consult with “representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives” about how best “to promote distance education through digital technologies . . . while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.” *Id.*

<sup>115</sup> *See id.*; COPYRIGHT OFFICE REPORT, *supra* note 2, at 127.

<sup>116</sup> DMCA, *supra* note 23, at § 403(a)(4).

<sup>117</sup> *See* Promotion of Distance Education Through Digital Technologies, 63 Fed. Reg. 220 (Nov. 16, 1998); 63 Fed. Reg. 246 (Dec. 23, 1998); 64 Fed. Reg. 36 (Feb. 24, 1999). *See also* COPYRIGHT OFFICE REPORT, *supra* note 2, at 4. The Copyright Office also received a myriad of official comments by interested parties, and met informally with a number of specialists. *Id.* at 4-6.

<sup>118</sup> *Id.* at 6.

<sup>119</sup> For example, the Association of American Publishers, the American Society of Journalists and Authors, the Motion Picture Association of America, the Recording Industry Association of America, Inc., the National Music Publishers Association, and Houghton-Mifflin Co. *See* United States Copyright Office website, *Copyright and Digital Distance Education*, <http://www.copyright.gov/disted/comments.html> (last visited Feb. 21, 2006).

<sup>120</sup> For example, David R. Pierce, President, American Association of Community Colleges, University of North Carolina at Chapel Hill, University of Michigan, The University of Texas System, University of Maryland University College, Utah Education Network, American Association of Universities, American Council on Education, Technical College of the Low Country, California Virtual University, Albert Carnesale, Chancellor, UCLA, Rochester Institute of Technology, and Brian Nielsen, Manager, Learning Technologies, Northwestern University. *See id.*

organizations,<sup>121</sup> education and technology companies,<sup>122</sup> and trade associations.<sup>123</sup> From the onset, however, two main sides clearly emerged from the discussions – educators and copyright owners. Both sides argued vigorously in defense of their respective positions.

Copyright owners argued that the pre-TEACH distance education exemption should not be amended.<sup>124</sup> They pointed to the fact that the distance education market was growing by “leaps and bounds” without an expanded exemption.<sup>125</sup> Further, copyright owners asserted that the fair use exception was adequate to allow distance educators to migrate course content online.<sup>126</sup> Additionally, owners were concerned that expanding the education exemption would hurt their markets by “interfering with licensing opportunities” and by increasing the risk of rampant dissemination of copyrighted works over the Internet.<sup>127</sup> Finally, copyright owners urged that licensing expenses should be seen simply as part of the cost of online education.<sup>128</sup>

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<sup>121</sup> For example, Broadcast Music, Inc. and the Copyright Clearance Center, Inc. *See id.*

<sup>122</sup> For example, the Education Management Corporation and InfoNetworks, Inc. *See id.*

<sup>123</sup> For example, the Visual Resources Association, the College Art Association, the Association of Test Publishers, the American Association of University Professors, the University Continuing Education Association, and the Software and Information Industry Association. *See id.*

<sup>124</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 128, 131. *See* AAP Comment, *supra* note 7, at 3 (“Nothing in the hearings or written comments supplied by proponents of an exemption demonstrates any need for that exemption.”); Motion Picture Association of America Comment to the Copyright Office 2 (Feb. 5, 1999), *available at* <http://www.copyright.gov/disted/comments/init022.pdf> (“The mere fact that technological advances have occurred . . . is not evidence that changes in the copyright law are necessary.”); Recording Industry Association of America, Inc. Comment to the Copyright Office 2 (Feb. 5, 1999), *available at* <http://www.copyright.gov/disted/comments/init023.pdf> (“[N]o substantive changes to the Copyright Act are necessary to promote distance education through digital technologies . . . .”); Broadcast Music, Inc. Comment to the Copyright Office 7 (Jan. 26, 1999), *available at* <http://www.copyright.gov/disted/comments/init003.pdf> [hereinafter BMI Comment] (“To the extent that any exemption for educational uses of digital technologies is required, BMI believes that the current law is more than adequate.”).

<sup>125</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 128-29. *See* BMI Comment, *supra* note 124, at 7 (“[T]he rapid and continuing growth of distance education programs seems to suggest that no further protective legislation is necessary.”).

<sup>126</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 129; AAP Comment, *supra* note 7, at 2; *see* BMI Comment, *supra* note 124, at 7.

<sup>127</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 129, 132. (“When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to friends and acquaintances around the world.”)

<sup>128</sup> *Id.* at 129.

Distance educators, on the other hand, argued for a wholesale change to the existing law.<sup>129</sup> They believed that the pre-TEACH distance education exemption impeded the growth and development of online courses.<sup>130</sup> Thus, they argued that the exemption should be broadened to include the “display” and “performance” of all types of works in the course of online classes.<sup>131</sup> Educators also felt that fair use and licensing were not viable alternatives to a specific copyright exemption in terms of promoting distance education courses.<sup>132</sup> Additionally, they asserted that licensing fees on top of the substantial start-up and maintenance costs for online education programs created unreasonable barriers to entry for institutions wishing to offer online courses.<sup>133</sup>

The Register ultimately concluded that the time was right for a change in the law.<sup>134</sup> Thus, the Copyright Office Report recommended that the distance education exemption be rewritten to grant distance educators substantially the same freedom to use unauthorized copyrighted works as their face-

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<sup>129</sup> *Id.* at 132.

<sup>130</sup> *See id.* at 128; Association of American Universities et al Comment to the Copyright Office 2 (Feb. 5, 1999), *available at* <http://www.copyright.gov/disted/comments/init031.pdf> (noting that the pre-TEACH distance education exemption was based on technologies developed in the 1970s and that the exemption needed to be “updated to accommodate the expanded educational opportunities supported by new technologies”).

<sup>131</sup> In general, educators sought the following changes to the distance education exemption:

- 1) elimination of the concept of the physical classroom as a limitation on the availability of the exemption;
- 2) coverage of rights in addition to performance and display, at least to the extent necessary to permit digital transmissions; and
- 3) expansion of the categories of works covered, by broadening the performance right exemption to apply to works other than nondramatic literary and musical works.

COPYRIGHT OFFICE REPORT, *supra* note 2, at 133.

<sup>132</sup> *Id.* at 128; UM Comment, *supra* note 6, at 8; American Library Association et al Reply Comment to the Copyright Office 4, *available at* <http://www.copyright.gov/disted/reply/reply017.pdf> (last visited Feb. 21, 2006). For a more detailed discussion of why licensing and fair use are not viable alternatives to a specific statutory distance education exemption, *see supra* Section III.B.

<sup>133</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 128; *see supra* Section III.B.

<sup>134</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 144 (“Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue . . . . In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.”).

to-face teaching counterparts.<sup>135</sup> The Report noted that both the face-to-face teaching exemption and the distance education exemption were based on a “policy determination that certain uses of copyrighted works in connection with instruction should be permitted without the need to obtain a license or rely on fair use.”<sup>136</sup> The Report further found that by 1999 the distance education exemption had fallen out of step with modern technology.<sup>137</sup> Therefore, the Report concluded, the distance education exemption must be updated to “continue the basic policy balance struck in 1976.”<sup>138</sup>

One of the specific recommendations that the Report made was to maintain existing standards of eligibility for the distance education exemption.<sup>139</sup> However, the Report made this specific recommendation hesitantly.<sup>140</sup> This is because there was considerable debate in the course of the study as to whether “nonprofit” was the appropriate dividing line for eligibility for the exemption.<sup>141</sup> Some parties argued that all accredited educational institutions should be eligible for the exemption, whether nonprofit or for-profit.<sup>142</sup> Others argued that only accredited nonprofit institutions should be eligible.<sup>143</sup> The Copyright Office Report observed:

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<sup>135</sup> See *id.* (noting that under the 1976 Copyright Act, Congress intended 17 U.S.C. § 110(1) & (2) to cover “all of the various methods by which performances or displays in the course of systemic instruction take place”) (quotations omitted).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 144-45 (“[T]he technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods of systemic instruction.”).

<sup>138</sup> *Id.* at 145.

<sup>139</sup> Thus, the Register recommended that only “nonprofit educational institutions” be eligible for the amended distance education exemption. COPYRIGHT OFFICE REPORT, *supra* note 2, at 153-54.

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 153; Education Management Corporation Comment to the Copyright Office 3 (Feb. 5, 1999), available at <http://www.copyright.gov/disted/comments/init002.pdf> (advocating that the eligibility requirement should be student-centered, and thus nonprofit and for-profit institutions would be eligible for the exemption); The University of Texas System Comment to the Copyright Office 9, available at <http://www.copyright.gov/disted/comments/init020.pdf> (last visited Feb. 21, 2006) (“Accredited and nonprofit institutions have the strongest claim to such an exemption.”).

<sup>142</sup> See, e.g., American Association of University Professors Comment to the Copyright Office 6 (Jan. 26, 1999), available at <http://www.copyright.gov/disted/comments/init038.pdf> [hereinafter AAUP Comment] (“AAUP recommends that the Copyright Office limit any exemption to accredited educational offerings.”).

<sup>143</sup> See, e.g., American Society of Journalists and Authors Comment to the Copyright Office 4 (Feb. 4, 1999), available at <http://www.copyright.gov/disted/comments/init007.pdf> (arguing that the exemption should only apply to “accredited nonprofit institutions”).

During the course of this study, there was extensive debate over the appropriateness of retaining the “nonprofit” element in the context of today’s digital distance education. While mainstream education in 1976 was the province of nonprofit institutions, today the lines have blurred. Profit-making institutions are offering distance education; nonprofits are seeking to make a profit from their distance education programs; commercial entities are forming partnerships with nonprofits; and nonprofits and commercial ventures are increasingly offering competitive products.<sup>144</sup>

Despite these observations, the Office ultimately decided that a change in the eligibility requirements was not appropriate at that time, and thus recommended to Congress that only “nonprofit education institutions” qualify for the distance education exemption.<sup>145</sup> Presumably, the Office made this recommendation because “nonprofit” had always been the dividing line, and it had not been convinced that a change was warranted. However, the Copyright Office Report also left the door open for future discussion on this question. Specifically, it stated that the issue of eligibility is an “important and evolving issue that deserves further attention in the future.”<sup>146</sup>

#### B. *The Passage of the TEACH Act*

The Technology, Education, and Copyright Harmonization Act of 2002 enacted most of the Copyright Office’s recommendations into law.<sup>147</sup> The Act essentially rewrote section 110(2) of the 1976 Copyright Act.<sup>148</sup> Directly addressing the shortcomings of the old distance education exemption,<sup>149</sup> the newly enacted section 110(2) allows for the “performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of transmission.”<sup>150</sup> In other words, the TEACH Act freed distance educators to “display” and “perform” reasonable

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<sup>144</sup> COPYRIGHT OFFICE REPORT, *supra* note 2, at 153.

<sup>145</sup> *Id.* Therefore, the Copyright Office recommended that the eligibility requirements for distance educators be the same as for face-to-face educators. *Id.*

<sup>146</sup> *Id.* at 154.

<sup>147</sup> See Hutchinson, *supra* note 19, at 2219; see also NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C).

<sup>148</sup> Compare 17 U.S.C. § 110(2) (2000) with 17 U.S.C.A. § 110(2) (2005); see NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C)(2).

<sup>149</sup> See Section III.A.

<sup>150</sup> TEACH Act, *supra* note 3; 17 U.S.C.A. § 110(2) (2005).



portions of all types of copyrighted works in the course of online classes.<sup>151</sup> However, while the TEACH Act expanded the distance education exemption to include all types of copyrighted works,<sup>152</sup> it was still more restrictive than the face-to-face teaching exemption.<sup>153</sup> One of the crucial differences between section 110(1)<sup>154</sup> and section 110(2) is that while all “nonprofit education institution[s]” qualify for the face-to-face teaching exemption, only those that are “accredited” qualify for the distance education exemption.<sup>155</sup> As will be argued here, the accredited requirement alone is sufficient to protect the interests of copyright owners, particularly since the TEACH Act also included other significant limitations to protect the interests of copyright owners.<sup>156</sup>

The first of these limitations is that only a “display” or “performance” of a copyrighted work that is “a regular part of the systemic mediated instructional activities” of the institution are exempt.<sup>157</sup> This language is intended to clarify that the unauthorized use of a copyrighted work in a distance education class is only exempt from infringement liability when

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<sup>151</sup> By granting distance educators significantly expanded user rights, the TEACH Act brought the distance education exemption more in line with the face-to-face teaching exemption. Hutchinson, *supra* note 19, at 2220 (“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. This expansion is necessary to prevent students who choose to take online courses from receiving educational experiences inferior to their on-campus counterparts.”).

<sup>152</sup> Except that the statute specifically *excludes* works that are “produced or marketed primarily” for use in distance education courses. See 17 U.S.C.A. § 110(2) (2005). While it may seem odd to specifically exclude distance education materials from the distance education exemption, the legislative history reveals that Congress was careful to protect the primary market for these types of works. S. REP. NO. 107-31, at 8 (2001).

<sup>153</sup> Compare 17 U.S.C. § 110(1) (2000) with 17 U.S.C.A. § 110(2) (2005).

<sup>154</sup> This is the face-to-face teaching exemption, which grants broader user rights than the distance education exemption. The relevant portion of the statute sets forth that the following uses are not an infringement of copyright: 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.” 17 U.S.C. § 110(1) (2000).

<sup>155</sup> Thus, the eligibility requirements for the distance education exemption are narrower than the face-to-face exemption. Compare 17 U.S.C. § 110(1) (2000) with 17 U.S.C.A. § 110(2) (2005).

<sup>156</sup> As was discussed *supra* Section II.B, the distance education exemption has always been more limited than the face-to-face exemption. This is due to the heightened concern of copyright piracy with digital transmission. See S. REP. NO. 107-31, at 11-12 (2001).

<sup>157</sup> 17 U.S.C.A. § 110(2)(A) (2005). This section of the statute also specifies that 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 the class session.” *Id.*

it is part of normal teacher-centered instruction.<sup>158</sup> Second, the unauthorized display or performance of a copyrighted work in an online class must be “directly related and of material assistance to the teaching content of the transmission.”<sup>159</sup> One commentator explains that this limitation is meant to prevent “entertainment uses of copyrighted material in the classroom without permission.”<sup>160</sup> Third, the copyrighted work may only be transmitted, to the extent technologically feasible, to “students officially enrolled in the course for which the transmission is made.”<sup>161</sup> This provision broadens the requirement under the old distance education exemption that the transmission be directed at classrooms or students with disabilities.<sup>162</sup>

Fourth, an educational institution, as the “transmitting body,” must institute policies promoting institutional compliance with federal copyright law.<sup>163</sup> This limitation directly addresses the concerns of copyright owners that the digital transmission of copyrighted works (as opposed to the mere “display” of such works in a traditional classroom) poses a substantially greater risk of illegal dissemination over the Internet, and is intended to promote “an environment of compliance” at educational institutions.<sup>164</sup> Fifth, in relation to the dissemination of copyrighted works over the Internet, institutions must apply “technological measures that reasonably prevent” students from further distributing copyrighted works over the Internet.<sup>165</sup> The House Report makes clear that this provision is *not* intended to impose a duty on educators to guarantee that further dissemination of copyrighted works by students will never occur. Instead, “the obligation to reasonably prevent contemplates an objectively reasonable standard regarding the ability of a technological

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<sup>158</sup> S. REP. NO. 107-37, at 9 (2001).

<sup>159</sup> 17 U.S.C.A. § 110(2)(B) (2005).

<sup>160</sup> Lipinski, *supra* note 111, at 107.

<sup>161</sup> 17 U.S.C.A. § 110(2)(C) (2005). The statute also allows for the transmission to be directed to “officers or employees of governmental bodies as a part of their official duties,” but this is not relevant to the present inquiry. *Id.*

<sup>162</sup> SEN. REP. NO. 107-31, at 11 (noting that “one of the great potential benefits of digital distance education is its ability to reach beyond the physical classroom, to provide quality educational experiences to all students”).

<sup>163</sup> 17 U.S.C.A. § 110(2)(D)(i) (2005).

<sup>164</sup> S. REP. NO. 107-31, at 11.

<sup>165</sup> 17 U.S.C.A. § 110(2)(D)(ii)(I) (2005).

protection measure to achieve its purpose.”<sup>166</sup> Finally, institutions that qualify for the distance education exemption must also promise not to engage in conduct that could “reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.”<sup>167</sup> The legislative history of the TEACH Act reveals that these last several limitations were a direct response to the concerns of copyright owners that allowing the transmission of copyright works over the Internet would give rise to rampant copyright piracy.<sup>168</sup>

This is why it is curious that in addition to these hurdles, institutions must also be both accredited and nonprofit to qualify for the exemption. These criteria are especially striking since accredited for-profit institutions far outpace their nonprofit counterparts in offering and delivering online courses catered to adults, rural students, working parents, and students with disabilities.<sup>169</sup>

#### V. ACCREDITED V. NONPROFIT ACCREDITED: WHAT SHOULD HAVE BEEN THE ELIGIBILITY REQUIREMENTS FOR THE DISTANCE EDUCATION EXEMPTION?

When the TEACH Act was first proposed by Congress, the legislative goal was to promote digital distance education by expanding section 110(2) to exempt dissemination of copyrighted works over the Internet in the course of online classes.<sup>170</sup> This, of course, was to be accomplished without running afoul of the rights of copyright owners.<sup>171</sup> The idea was

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<sup>166</sup> H.R. REP. NO. 107-687, at 13 (2002). See NIMMER ON COPYRIGHT, *supra* note 50, at § 8.15(C)(2)(e) (pointing out that, in this context, “strict liability is not intended”). However, at least one institution, wary of copyright infringement liability, has foregone relying on the TEACH Act due to this provision. Carnevale, *supra* note 67, at 28.

<sup>167</sup> 17 U.S.C.A. § 110(2)(D)(ii)(II) (2005). At least one commentator has noted that the TEACH Act continues a trend in copyright law – in return for use rights, Congress increasingly places an affirmative duty on institutions to monitor compliance with the law. See Lipinski, *supra* note 111, at 133.

<sup>168</sup> See S. REP. NO. 107-31, at 5. (“[T]he ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies creates new risks for the owners of copyrighted works used in distance education”); Hutchinson, *supra* note 19, at 2221 (“[T]he majority of the debate throughout the legislative process centered around the issue of how to protect copyright owners’ markets . . .”).

<sup>169</sup> See *supra* note 46.

<sup>170</sup> See SEN. REP. NO. 107-31, at 3.

<sup>171</sup> See *id.*

that distance educators should have access to the same resources and content as their face-to-face teaching counterparts.<sup>172</sup> However, Congress crafted an additional hurdle for educators to cross in order to take advantage of the TEACH Act. While all “nonprofit educational institution[s]” qualify for the face-to-face teaching exemption, only “*accredited* nonprofit educational institution[s]” are eligible for the distance education exemption.<sup>173</sup> Further narrowing the distance education exemption in comparison to the face-to-face exemption are the six other limitations, discussed above,<sup>174</sup> which also address the concerns of copyright owners.<sup>175</sup> The central question posed by this note, then, is whether it was sound public policy to require significantly more restrictive eligibility requirements for the distance education exemption, or simply a bad compromise to the interests of copyright owners.<sup>176</sup>

In order to answer this question, this section will first analyze the process of accreditation to determine whether or not it is rigorous enough to address copyright owners’ legitimate concern that the distance education exemption only be used for bona fide educational purposes.<sup>177</sup> Second, this section will explore the debate that took place between educators and copyright owners about the eligibility requirements.<sup>178</sup> Finally, this section will conclude by arguing that the distance education exemption should be available to all “accredited” educational institutions, whether they are for-profit or not-for-profit.<sup>179</sup>

#### A. *What it Means To Be an Accredited Educational Institution*

The accreditation process in higher education is rigorous, particularly for for-profit online distance education

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<sup>172</sup> See *id.* at 4; Hutchinson, *supra* note 19, at 2206.

<sup>173</sup> Compare 17 U.S.C. § 110(1) (2000) with 17 U.S.C.A. § 110(2) (2005).

<sup>174</sup> See *supra* notes 156-68 and accompanying text.

<sup>175</sup> See S. REP. NO. 107-31, at 5; Hutchinson, *supra* note 19, at 2222 (“[C]opyright owners did not believe that the protections the [original] bill offered were sufficient.”).

<sup>176</sup> For a poignant statement on how the compromises made by educators to copyright owners in the negotiation process limited the impact of the TEACH Act, see Hutchinson, *supra* note 19, at 2206-07.

<sup>177</sup> See *infra* Section V.A.

<sup>178</sup> See *infra* Section V.B.

<sup>179</sup> See *infra* Section V.C.

providers.<sup>180</sup> With respect to two and four-year postsecondary educational institutions, accreditation is determined by a “regional or national accrediting agency recognized by the Council [for] Higher Education Accreditation or the United States Department of Education.”<sup>181</sup> The Council for Higher Education reported in August 2003 that there were 6,421 accredited educational institutions in the United States. While 2,804 (or 43.6%) of them were for-profit,<sup>182</sup> this number only represents about ten percent of the total number of for-profit degree-granting institutions in the United States.<sup>183</sup> As of 2002, more than one-third of the nation’s accredited institutions (including both for-profit and nonprofit schools) offered distance education courses, many of which could lead towards a degree.<sup>184</sup>

“Accreditation is a process of external quality review used by higher education to scrutinize colleges, universities and educational programs for quality assurance and quality improvement. In the U.S., accreditation is carried out by private, nonprofit organizations designed for this specific purpose.”<sup>185</sup> There are many essential benefits to being an accredited educational institution. First, employers and other professionals recognize that graduates of accredited schools have bona fide degrees.<sup>186</sup> Second, students who attend both nonprofit and for-profit accredited institutions generally have

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<sup>180</sup> The Distance Education and Training Council report that, of the total number of schools seeking accreditation, only about twenty-five percent receive it. United States Distance Learning Association, *The Value of Accreditation*, <http://www.usdla.org/html/resources/certification.htm> (last visited Feb. 21, 2006) [hereinafter USDLA website]. See WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 89 (“for-profit institutions . . . are the most highly regulated”).

<sup>181</sup> TEACH Act, *supra* note 3; 17 U.S.C.A. § 110(11) (2005).

<sup>182</sup> COUNCIL FOR HIGHER EDUC., FACT SHEET #1: PROFILE OF ACCREDITATION 1 (2003), available at [http://www.chea.org/pdf/fact\\_sheet\\_1\\_profile.pdf](http://www.chea.org/pdf/fact_sheet_1_profile.pdf) (last visited Nov. 4, 2005) [hereinafter PROFILE OF ACCREDITATION].

<sup>183</sup> See KATHLEEN F. KELLY, EDUC. COMM’N OF THE STATES, MEETING NEEDS AND MAKING PROFITS: THE RISE OF FOR-PROFIT DEGREE-GRANTING INSTITUTIONS 9 (2001), available at <http://www.ecs.org/clearinghouse/27/33/2733.htm> (last visited Feb. 21, 2006). Thus, if the exemption applied to accredited schools, most for-profit institutions would not be eligible, further assuring that the exemption would be used only for bona fide educational purposes.

<sup>184</sup> COUNCIL FOR HIGHER EDUC., ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING 4 (2002), available at [http://www.chea.org/pdf/mono\\_1\\_accred\\_distance\\_02.pdf](http://www.chea.org/pdf/mono_1_accred_distance_02.pdf) (last visited Nov. 4, 2005) [hereinafter ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING].

<sup>185</sup> PROFILE OF ACCREDITATION, *supra* note 182, at 2 (quotations omitted).

<sup>186</sup> See *id.*

access to federal funds.<sup>187</sup> Third, accredited institutions usually accept transfer credits from other accredited universities.<sup>188</sup>

The process of accreditation ensures that accredited institutions are committed to their educational missions.<sup>189</sup> According to the United States Distance Learning Association, "To gain recognized accreditation, an institution must have a certain number of years of operating experience and undergo an intensive review process. The process usually includes an evaluation and review of all the courses offered, as well as student and graduate surveys, and an on-site inspection."<sup>190</sup> Further, once an institution has been accredited, it must continue to submit annual reports and be re-examined on a periodic basis.<sup>191</sup>

Specific to the accreditation of distance education programs, the key concern for educators and accreditors is whether online courses maintain the same level of quality as traditional face-to-face courses.<sup>192</sup> To address this concern, the Council for Higher Education has adapted its accrediting procedures to account for the pedagogical differences between distance education courses and traditional face-to-face courses.<sup>193</sup> Specifically, the Council reviews seven key areas of an institution when examining the quality of its distance education courses: institutional mission,<sup>194</sup> institutional organizational structure,<sup>195</sup> institutional resources,<sup>196</sup> curriculum and instruction,<sup>197</sup> faculty support,<sup>198</sup> student

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<sup>187</sup> *Id.* Of the 6,421 accredited institutions, 6,134 of them qualify for federal grants and loans. *Id.* at 1.

<sup>188</sup> *Id.* at 2.

<sup>189</sup> See COUNCIL FOR HIGHER EDUC., THE FUNDAMENTALS OF ACCREDITATION: WHAT DO YOU NEED TO KNOW? 3 (2002), available at [http://www.chea.org/pdf/fund\\_accred\\_20ques\\_02.pdf](http://www.chea.org/pdf/fund_accred_20ques_02.pdf).

<sup>190</sup> USDLA website, *supra* note 180.

<sup>191</sup> *Id.*

<sup>192</sup> See AAUP Comment, *supra* note 142, at 2-3 (noting that the Association is concerned with the quality of education being provided in distance education courses); ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, *supra* note 184, at 7.

<sup>193</sup> ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, *supra* note 184, at 7.

<sup>194</sup> "Does offering distance learning make sense in this institution?" *Id.*

<sup>195</sup> "Is the institution suitably structured to offer quality distance learning?" *Id.*

<sup>196</sup> "Does the institution sustain adequate financing to offer quality distance learning?" *Id.*

<sup>197</sup> "Does the institution have appropriate curricula and design of instruction to offer quality distance learning?" *Id.*

<sup>198</sup> "Are faculty competent[ly] engaged in offering distance learning and do they have adequate resources, facilities, and equipment?" *Id.*

support,<sup>199</sup> and student learning outcomes.<sup>200</sup> Thus, because of these additional review criteria, the process of accreditation for both nonprofit and for-profit institutions offering distance education courses is even more rigorous than the process for institutions not offering such courses.<sup>201</sup>

In addition to accreditation, for-profit educational institutions face regulatory hurdles that their nonprofit counterparts do not share.<sup>202</sup> Since for-profit institutions often operate in many states simultaneously, they face myriad regulations, which are often times inconsistent from state to state.<sup>203</sup> In some states, for-profit institutions are regulated like any other business, and therefore must register with the state, as well as “pay taxes and file corporate documents annually.”<sup>204</sup> In other states, the laws focus on consumer issues, which “provide recourse for students who believe they have been misled or defrauded.”<sup>205</sup> Despite the difficulty in operating in many states at the same time, for-profit schools have generally welcomed extensive regulation.<sup>206</sup> This is because compliance with these laws helps demonstrate the integrity of the institution.<sup>207</sup>

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<sup>199</sup> “Do students have needed counseling, advising, equipment, facilities, and instructional materials to pursue distance learning?” ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, *supra* note 184, at 7.

<sup>200</sup> “Does the institution routinely evaluate the quality of distance learning based on evidence of student achievement?” *Id.*

<sup>201</sup> See WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 89.

<sup>202</sup> See KELLY, *supra* note 183, at 8. “In many states, there are different regulatory processes for public and private institutions and for for-profit and not-for-profit institutions. Established in-state not-for-profit institutions may be exempt [from state regulations], while new for-profit and out-of-state institutions are subject to regulation.” *Id.*

<sup>203</sup> *Id.* at 8-9. For example, in Texas, for-profit educational institutions are regulated by the Texas Workforce Commission, while in California they are regulated by the Department of Consumer Affairs. See WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 89.

<sup>204</sup> KELLY, *supra* note 183, at 8.

<sup>205</sup> *Id.* at 9.

<sup>206</sup> *Id.* (“Once state approval has been achieved, however, institutions tend to support continued regulation.”). However, the Web-based Education Commission reported that there are negative effects on distance educators resulting from the myriad of state regulations. WEB-BASED EDUC. COMM’N REPORT, *supra* note 1, at 90. Since “[s]ome state requirements are mutually exclusive,” institutions offering distance education classes may be “forced to meet the lowest common denominator” in order to comply. *Id.*

<sup>207</sup> KELLY, *supra* note 183, at 9 (“Approved institutions strive to be considered part of the higher education community and recognized for their contribution to statewide goals for higher education.”).

Finally, accredited for-profit education institutions must also overcome the stigma that their mission is incompatible with traditional academic values.<sup>208</sup> Specifically, critics have charged that for-profit institutions have “substandard admission criteria, superficial curricula and low expectations for student performance.”<sup>209</sup> This criticism, however, is not altogether fair. This is because the process of accreditation is the same for both nonprofit and for-profit educational institutions.<sup>210</sup> In other words, when nonprofit and for-profit institutions apply for accreditation, they are measured by the exact same standards with respect to the quality of the education they provide.<sup>211</sup> Additionally, for-profit institutions that offer distance education courses must also demonstrate that their online teaching methods meet the Council’s heightened guidelines for distance education accreditation.<sup>212</sup> The fact that for-profit and nonprofit schools are judged by the same standards for accreditation is evidence that they should also be judged by the same standards for the copyright exemption, particularly since both accreditation and the policy supporting the exemption are both related to pedagogy and best practices in the classroom.

#### B. *Accredited v. Nonprofit Accredited – The Debate*

The initial version of the TEACH Act introduced by Senators Hatch (R–UT) and Leahy (D–VT) in March 2001 was more favorable to educators than the bill that was eventually signed into law.<sup>213</sup> Specifically, the Hatch/Leahy bill incorporated the Copyright Office Report recommendation that “nonprofit educational institution[s]” be eligible for the

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<sup>208</sup> See *id.* at 3.

<sup>209</sup> *Id.*

<sup>210</sup> For example, the New England Association Schools and Colleges, one of eight regional accrediting organizations that are part of the Council for Higher Education Accreditation, does not distinguish between nonprofit and for-profit institutions in its accreditation process. See NEW ENGLAND ASSOCIATION OF SCHOOLS AND COLLEGES, STANDARDS FOR ACCREDITATION (2005), available at [http://www.neasc.org/cihe/accreditation\\_overview.htm](http://www.neasc.org/cihe/accreditation_overview.htm).

<sup>211</sup> See *id.*

<sup>212</sup> See ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, *supra* note 184, at 7.

<sup>213</sup> See Hutchinson, *supra* note 19, at 2218 (“While the initial version of the TEACH Act introduced in the Senate was relatively educator-friendly,” the amended bill that was enacted into law was the result of concessions made by educators to the copyright owners.)



exemption.<sup>214</sup> The bill was amended, however, several months after it was introduced, raising the bar for eligibility.<sup>215</sup>

Prior to its amendment, the Senate Judiciary Committee held a hearing on the TEACH Act.<sup>216</sup> In attendance were educators,<sup>217</sup> legal experts,<sup>218</sup> and copyright owners.<sup>219</sup> For-profit accredited universities were not represented at the hearing. All parties that were represented agreed that it was imperative for the TEACH Act to maintain the policy balance struck in the 1976 Copyright Act between the exclusive right of copyright owners to exploit their works, and the need of educators to have free access to those works.<sup>220</sup> Further, all agreed that the nonprofit eligibility requirement was insufficient to protect copyrighted works from the unauthorized use by fly-by-night<sup>221</sup> educational institutions.<sup>222</sup> Finally, all parties agreed<sup>223</sup> that accreditation was a more meaningful dividing line between those educators who should qualify for the exemption and those who should not.<sup>224</sup> This is why it is

<sup>214</sup> TEACH Act, *supra* note 3.

<sup>215</sup> See 147 CONG. REC. S5988 (daily ed. June 7, 2001). The amended bill added the “accredited” requirement to “nonprofit educational institution.” *Id.*

<sup>216</sup> *Hearing on S. 487, supra* note 8, at 1.

<sup>217</sup> Gerald A. Heeger, President of the University of Maryland University College, Paul LeBlanc, President, Marlboro College, and Richard M. Siddoway, Principal, Utah Electronic High School. *Id.* at ii.

<sup>218</sup> Marybeth Peters, Register of Copyrights, and Gary Carpentier, Adjunct Professor of Law at the Washington College of Law, American University. *Id.*

<sup>219</sup> Allan R. Adler, Vice President for Legal and Governmental Affairs for the Association of American Publishers. *Id.*

<sup>220</sup> In general, they also all agreed that it was necessary to amend the distance education exemption, and that it was necessary to enact safeguards to protect the interests of copyright owners. See *id.* at 9, 11 (statement of Marybeth Peters, Register of Copyrights); *Hearing on S. 487, supra* note 8, at 37 (statement of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University).

<sup>221</sup> “Fly-by-night” in this context means the opposite of “bona fide.” Thus, all parties wanted to limit the distance education copyright exemption to bona fide educational purposes. See 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch).

<sup>222</sup> See *Hearing on S. 487, supra* note 8, at 14 (statement of Marybeth Peters, Register of Copyrights) (“Content owners have expressed to the Copyright Office their concern that ‘nonprofit educational institution’ may not be the appropriate dividing line between institutions that may and may not use the exemption.”); *id.* at 52 (response of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University) (“By retaining the ‘non-profit requirement’ in current law, innovation is stymied.”).

<sup>223</sup> While the Register agreed that “nonprofit” alone was insufficient to protect copyright owners, she recommended that “accredited” be added to the “nonprofit” requirement.” *Id.* at 14 (statement of Marybeth Peters, Register of Copyrights).

<sup>224</sup> *Id.* at 51-52 (response of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University) (“The concept of accreditation, seems to me, to be a more valid and appropriate qualifier . . . . Accreditation is an

somewhat mysterious that the bill was amended on June 5, 2001 *adding* the “accredited” requirement to “nonprofit” instead of *replacing* it.<sup>225</sup>

The Senate Report justified the amended bill in several ways. First, it cited the Copyright Office Report, which set forth that “nonprofit educational institutions are no longer a closed and familiar group.”<sup>226</sup> Second, the Senate Report pointed to the fact that the Internet facilitates rampant dissemination of copyrighted works to unauthorized recipients.<sup>227</sup> Finally, the Senate Report stated that “accredited” was added to the eligibility requirement specifically to “provide further assurances that the [transmitting] organization is a bona fide educational institution.”<sup>228</sup>

C. *All Accredited Educational Institutions Should Be Eligible for the Distance Education Copyright Exemption*

If the original Hatch/Leahy bill had been enacted without amendment, the legislation would have clearly met one of its intended goals, which was to promote distance education by changing the law to give online educators comparable access to copyrighted works as face-to-face educators.<sup>229</sup> However, the fact that the bill was amended, substantially changing the eligibility requirements between the face-to-face teaching exemption and the distance education exemption, raises the question of whether “accredited nonprofit educational institution”<sup>230</sup> is the appropriate dividing line between those educators who are eligible for the distance education exemption and those who are not. By significantly altering the eligibility requirements, Congress left us to question whether it set the

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easier, more useful criterion that can be implemented to make this legislation work.”). *See id.* at 45 (response of Allan R. Adler, Vice President for Legal and Governmental Affairs, Association of American Publishers) (“[I]t is clear that establishing the revised exemption for the benefit of ‘nonprofit’ educational institutions is, for many such entities, an unnecessary and unfair advantage in a competitive marketplace that has made the distinction between ‘nonprofit’ and ‘for-profit’ providers largely irrelevant.”).

<sup>225</sup> *See* 147 CONG. REC. S5988 (daily ed. June 7, 2001).

<sup>226</sup> S. REP. NO. 107-31, at 9 (2001).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *See Hearing on S. 487, supra* note 8, at 5 (statement of Sen. Leahy, member of Senate Judiciary Comm.) (“This legislation will help clarify the law and allow educators to use the same rich material in distance learning over the Internet that they are now able to use in face-to-face classroom instruction.”).

<sup>230</sup> *See* TEACH Act, *supra* note 3; 17 U.S.C.A. § 110(2) (2005).

dividing line at the appropriate place to achieve the larger goal of the legislation, which was to promote distance education by expanding the copyright exemption to allow for free online use of copyrighted works.

The question now posed is simple. By enacting amended legislation that offered greater protection to the rights of copyright owners than even the Copyright Office Report recommended, did Congress meet its stated policy goal more effectively than if it had enacted amended legislation that granted greater rights to educators? By enacting the vast majority of the Office's recommendations, while conspicuously raising the eligibility requirement, it is now fair to question whether this was good national policy or an unreasonable compromise. It is set forth here that because distance education is vitally important to the growing communities it serves,<sup>231</sup> because the process of accreditation is sufficiently rigorous to ensure that the distance education exemption is not abused,<sup>232</sup> and because the TEACH Act already included safeguards to protect the economic interests of copyright owners,<sup>233</sup> the TEACH Act would have been more effective policy if the distance education exemption applied to *all* accredited educational institutions. This is particularly true since the institutions that are succeeding in distance education are those that are doing so on a for-profit basis.<sup>234</sup>

Distance education serves non-traditional students such as working mothers, students with disabilities, and students in rural areas.<sup>235</sup> Further, distance education is working to bridge the "digital divide" in America by attracting students who would not otherwise be able to attend college.<sup>236</sup> Educators and policymakers agree that distance education is vital to America's ability to compete in an increasingly global marketplace.<sup>237</sup> Thus, Congress has consciously enacted legislation in recent years to promote distance education over the Internet.<sup>238</sup>

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<sup>231</sup> See *supra* notes 36-42 and accompanying text.

<sup>232</sup> See *supra* Section V.A.

<sup>233</sup> See *supra* notes 156-68 and accompanying text.

<sup>234</sup> See *supra* note 46.

<sup>235</sup> See *supra* notes 36-42 and accompanying text.

<sup>236</sup> See *supra* notes 70-75 and accompanying text.

<sup>237</sup> See *supra* notes 68-69 and accompanying text.

<sup>238</sup> See *supra* notes 59-64, 69 and accompanying text.

The TEACH Act is a prominent example of this type of legislation. However, the TEACH Act was unnecessarily targeted at nonprofit institutions, even though for-profit institutions have proven to be more successful providers of distance education courses.<sup>239</sup> Thus, the TEACH Act failed in its primary goal to promote digital distance education because the restrictive eligibility requirements have severely limited its impact. The TEACH Act simply does not reach many of the institutions who are in the best position to take advantage of its safe harbor – accredited for-profit universities who now dominate the distance education field.<sup>240</sup> However, it is not too late for Congress to fix its mistake.

Congress should once again address the distance education copyright exemption. In order to maximize the impact of the exemption, and to more successfully promote digital distance education, Congress should remove the “nonprofit” eligibility requirement. Though copyright owners would resist such a change, they should feel safe knowing that accreditation alone is a sufficiently rigorous process to ensure that the distance education exemption only be used for bona fide educational purposes.<sup>241</sup> Additionally, the TEACH Act’s six additional eligibility requirements ensure that an amended distance education exemption would not be abused.<sup>242</sup> Thus, removing the “nonprofit” requirement would promote digital distance education without running afoul of the exclusive rights of copyright owners.

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<sup>239</sup> See *supra* note 46 and accompanying text.

<sup>240</sup> See *supra* note 46.

<sup>241</sup> See *supra* Section V.A.

<sup>242</sup> See *supra* notes 156-68 and accompanying text.

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