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before the
Senate Committee on the Judiciary**

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Technology, Education and Copyright Harmonization ("TEACH") Act (S. 487)

The Copyright Office is pleased to present its views on S. 487, the Technology, Education and Copyright Harmonization ("TEACH") Act. This important legislation updates sections 110(2) and 112 of the Copyright Act to allow the same activities to take place using digital delivery mechanisms that were permitted under the policy balance that was struck by Congress when the law was enacted in 1976, while introducing safeguards to minimize the additional risks to copyright owners that are inherent in exploiting works in a digital format.

Background

Section 403 of the DMCA directed the Copyright Office to consult with affected parties and, within six months of the date of enactment, make recommendations to Congress on how to promote distance education through digital technologies. The Office was specifically directed to consider the following issues: the need for a new exemption, the categories of works to be included in any exemption, appropriate quantitative limitations on the portions of works that may be used under any exemption, which parties should be eligible for any exemption, which parties should be eligible recipients of distance education material under any exemption, the extent to which use of technological protection measures should be mandated as a condition of eligibility for any exemption, the extent to which the availability of licenses should be considered in assessing eligibility for any exemption and other issues as appropriate.

At the conclusion of an intensive process of identifying stakeholders, holding public hearings, soliciting comments, conducting research, and consulting with experts in various fields, the Office issued a [Report on Copyright and Digital Distance Education](#) in May, 1999 recommending changes to the existing exemption for distance education, section 110(2). More recently, the Copyright Office has consulted informally with representatives of the educator and content communities to hear their respective concerns regarding the Office's legislative recommendations.

In preparing our Report we found that digital distance education was a field that was undergoing rapid - even explosive - growth, but one that was still in its infancy. Technological change had made it possible for educators to reach a vastly broader student population with a richer variety of course materials than was ever possible before the advent of the Internet. At the same time, the same technological changes created a huge potential market for creators and publishers to license their works for use in distance education.

Part of the challenge for this Office in formulating recommendations addressing digital distance education was to remove technologically obsolete legal provisions as an impediment to carrying forward the distance education activities sanctioned by Congress in 1976 into the twenty-first century, without killing a nascent and potentially important market for right holders. We concluded that this could best be accomplished by using the policy line drawn by Congress in 1976 as the point of reference for a technological updating of section 110(2) that would take account of the nature and capabilities of digital networks.

At the same time, the Copyright Office was mindful of the risks that are inherent in the exploitation of copyrighted works in digital form. We concluded that additional safeguards were necessary to minimize the risk to right holders that legitimate use of works under an expanded and updated distance education exemption could result in copyright piracy.

S. 487 incorporates many of the recommendations that we made in our 1999 Report, modified in certain instances to accommodate concerns expressed by representatives of the affected communities.

The remainder of this testimony focuses on how the bill would change current law in implementing the recommendations from our Report. Where appropriate, we indicate potential concerns with the language of the bill that may require further consideration.

Existing Law

Three exemptions together largely define the scope of permitted uses for instructional activities: two specific instructional exemptions in section 110, and the fair use doctrine of section 107. Sections 110(1) and (2) together were intended to cover all of the methods by which performances or displays in the course of systematic instruction take place. Section 110(1) exempts the performance or display of any work in the course of face-to-face teaching activities. Section 110(2) covers the forms of distance education existing when the statute was enacted in 1976, exempting certain performances or displays in the course of a transmission - i.e., an instructional television or radio broadcast. Both subsections contain a number of limitations and restrictions. In particular, the section 110(2) exemption from the performance right (as distinguished from the exemption from the display right) applies only to nondramatic literary and musical works. Section 110(2) also contains limitations on the nature and content of the transmission, and the identity and location of the recipients. The performance or display must be made as a regular part of systematic instructional activity by a nonprofit educational institution or governmental body; it must be directly related and of material assistance to the teaching content; and it must be made primarily for reception in classrooms or places of instruction, or to persons whose disabilities or other special circumstances prevent their attendance in classrooms, or to government employees.

In addition, although the term "transmission" as used in section 110(2) is not limited to analog technology, and would therefore include digital transmissions, the provision would only permit digital transmissions to the extent that they do not implicate exclusive rights other than the public performance and public display rights. Since the reality of digital technology is that most digital transmissions entail reproduction and distribution (as those terms are defined in the copyright law and interpreted by the courts), the practical outcome is that most digital transmissions are not exempted under section 110(2).

Analysis of the Bill

Section 2. Exemption of Certain Performances and Displays for Educational Uses

Scope of the exemption

Section 2 of the bill amends the chapeau paragraph of 17 U.S.C. 110(2), altering the scope of the exemption by expanding both the rights and the categories of works that are covered.

Unlike the analog transmissions contemplated in the current law, digital transmissions implicate the reproduction and distribution rights in addition to the public performance and public display rights. The making of temporary reproductions is an integral part of the technology of transmitting digital data from one point to another. It is settled case law in the U.S. that such temporary reproductions implicate the reproduction right. Similarly, courts have held that such activity can be deemed a distribution as well. In order to address these technological realities, the bill amends section 110(2) to cover the rights to reproduce a work "in transient copies or phonorecords created as a part of the automatic technical process of a digital transmission" permitted under section 110(2), and to distribute "such copies or phonorecords" in the course of a digital transmission authorized by section 110(2), "to the extent technologically necessary to transmit the performance or display."

The expansion of the 110(2) exemption to cover these two additional rights is phrased very narrowly in order to avoid changing the central character of section 110 from an "exemption of certain performances and displays" to an exemption permitting the delivery of copies or phonorecords that substitute for the purchase by the student of the materials performed or displayed. As amended, section 110(2) would permit reproduction and distribution only to the extent technologically required in order to transmit the performance or display permitted by the exemption.

In our informal consultations with the educator community, concern was expressed that the exemptions from the reproduction and distribution rights were too limited for an institution to be able to carry out a permitted transmission without potential liability. As the originator of the transmission, an institution could potentially be liable for any reproduction that occurs along the transmission path from the institution's server to the student's personal computer. Although many of the copies would fall within the scope of the proposed exemption, it is inevitable that some copies, such as cache copies in an Internet service-provider's proxy cache or a user's browser cache, would be made, but would not be

considered "transient," would not be "technologically necessary to transmit the performance or display" and would not, as required in proposed section 110(2)(D), be "retained for no longer than reasonably necessary to complete the transmission." Apart from initiating the transmission, the institution has no role in the making and retention of such copies, and is powerless to prevent them. The copies are simply a by-product of how the technology works today. But they do not fall within the scope of the exemption provided in the bill, and they could result in potential liability for the institution.

These concerns appear to be valid, and merit further consideration. We would be pleased to continue to work with the Committee and the affected parties to craft language to address these concerns.

Content owners have expressed concern about the existing exemption from the public display right as applied to digital distance education. Specifically, they are concerned that permitting the display of entire literary works in the context of digital distance education has a much greater impact on copyright holders than permitting the display of entire works for purposes of instructional broadcasting. "Display" of a book using the technology of distance education in 1976 meant showing it - holding it up for the camera to see. Display of a book using today's technology means making the entire work available digitally. The technology of 1976 did not make it possible for the display of a textbook to substitute for its purchase, but the technology of 2001 does.

The exemption from the copyright owner's exclusive right to display the work publicly would permit both activities. The Copyright Act defines "display" of a work as showing a copy of a work either directly or by means of "any other device or process." To display a work "publicly" is to display "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." Holding a book up to a camera or using an e-book through an online delivery system both fall comfortably within these definitions.

Nevertheless, in the view of the content community, Congress, in exempting entire works from the display right in 1976, did not intend to permit uses that were more extensive than those that were possible under the technology of the time. Congress certainly did not intend that an exempted display of a textbook under section 110(2) be capable of substituting for the purchase of that book, as today's technology makes possible.

We believe that these observations of the content community are essentially correct, but it is our view that their concerns are addressed by the limitation of permitted displays in amended section 110(2)(A) to those made "as an integral part of a class session." Even though "class session" arguably has less strictly defined parameters in a digital network environment than it does in other contexts, the Copyright Office does not view the concept as being entirely devoid of meaning. For example, the display of an entire textbook could not take place in the course of a class session and would not be exempted conduct under the scope of an updated section 110(2). The technology of 1976 made it impossible for the display of a textbook to substitute for its purchase. Although today's digital technology would make it possible to display an entire book, the limitation that was once inherent in the technology is carried forward through the concept of a class session.

The other expansion of the scope of the exemption accomplished by the bill is to allow performances of categories of copyrighted works other than the nondramatic literary and musical works that already may be performed under current law. This provision implements a recommendation in our Report that recognized that educators preparing course material do not differentiate in the selection of subject matter based upon the categories of works in section 102 of the Copyright Act, and that current technology permits educators to recreate through distance education the same rich pedagogical experience enjoyed face-to-face with students in a classroom setting. Section 110(1) of the Act permits the use of any work in a face-to-face classroom setting.

However, as our Report also recognized, the potential impact on secondary markets for the principal categories of works that are affected by this expansion - audiovisual works, sound recordings, and dramatic literary and musical works - could be substantial. Transmission of entertainment products like motion pictures and sound recordings could well substitute for students paying to enjoy them elsewhere. The bill addresses this concern by limiting performance of the newly-added categories of works to "reasonable and limited portions."

It should be noted that when the current 110(2) exemption was enacted in 1976, there was no public performance right that covered sound recordings (a limited public performance right for sound recordings which covers only certain digital transmissions was enacted in 1995). Consequently, there was no need to address the appropriate treatment of sound recordings in the discussions leading to the

enactment of the current section 110(2) exemption. The Copyright Office, however, regards sound recordings to be as vulnerable to the risks of downstream digital distribution as audiovisual works, which militates against permitting anything but "reasonable and limited" portions of those works to be used under the exemption.

Works that are produced primarily for instructional use may be neither performed nor displayed under the exemption, because for such works, unlike entertainment products or materials of a general educational nature, an exemption would cut significantly into primary markets, impairing incentives to create. Including such works within the exemption would interfere with the efficient functioning of the marketplace for licenses. As we stated in our Report, we believe that under current conditions, works created primarily for instructional uses will be licensed efficiently in the educational market.

As an additional safeguard, this provision requires that the exempted performance or display be made from a copy both lawfully made and lawfully acquired.

Criteria for eligibility

Section 110(2) currently contains several criteria which must be met for a performance or display to qualify for the exemption. These criteria relate to the identity of the transmitting institution and the nature of the activities of which the performance or display is a part; the nature of the performance or display; and the identity and location of the recipients of the transmission. Section 2 of the bill amends the existing criteria to update them and make them relevant to distance education as it is carried out on digital networks. The bill also adds additional criteria as additional safeguards against digital piracy.

Except in fairly limited circumstances, transmissions under the current provision must be made to students in a physical classroom. The bill eliminates the requirement of a physical classroom by permitting transmissions to be made to students officially enrolled in the course and to government employees, regardless of their physical location. The bill retains the current limitation in section 110(2)(B) that the performance or display be "directly related and of material assistance to the teaching content of the transmission" and, in lieu of limiting transmissions to a physical classroom, adds two additional safeguards.

First, section 110(2)(A), as amended by the bill, emphasizes the concept of mediated instruction by mandating that the exempted performance or display be analogous to the type of performance or display that would take place in a live classroom setting. The performance or display must still be carried out by a government body or nonprofit educational institution, and must still be a regular part of the institution's systematic instructional activities. In addition, the bill requires that the transmission be made "by or at the direction of an instructor as an integral part of a class session." In sum, the work must be used as an integral part of a classroom experience (albeit a virtual one), controlled by the instructor, rather than as supplemental or background information to be experienced independently.

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, since institutions that are not bona fide educational institutions may enjoy nonprofit status. They have proposed that the word "accredited" be added as an additional qualification. The Office views this as a valid concern. We are uncertain, however, whether lack of accreditation is necessarily an appropriate basis for denying an institution the benefit of the exemption, or, conversely, whether accreditation is an appropriate basis for granting an institution the benefit of the exemption. This is especially true given the lack of uniform national standards for accreditation, and the resulting geographic inequity of such a condition. However, the Committee should consider whether another criterion, in addition to an institution's nonprofit status, could be used to limit the benefit of the exemption to bona fide educational institutions.

The second safeguard introduced in lieu of limiting transmissions to a physical classroom is found in section 110(2)(C), as amended by the bill. This provision adds the requirement that the transmission must be made solely for, and, to the extent technologically feasible the reception of the transmission must be limited to, two defined classes of eligible recipients: students officially enrolled in the course for which the transmission is made; and officers or employees of governmental bodies as part of their official duties of employment. When we prepared our Report there was widespread agreement, in the testimony and comments submitted to the Office, that the exemption should benefit only students officially enrolled in the particular course for which the transmission is made. The bill requires, to the extent technologically feasible, that technical measures be employed to ensure this.

Section 2 of the bill also adds new safeguards to counteract the new risks posed by the

transmission of works to students in digital form. A new paragraph (D) requires that transient copies permitted under the exemption be retained no longer than reasonably necessary to complete the transmission. As discussed above in reference to the chapeau paragraph of section 110(2), concerns have been expressed to the Office regarding the possible retention of copies that are created automatically in the course of the transmission and are outside the control of the transmitting institution "for longer than reasonably necessary to complete the transmission." Further consideration should be given to this criterion to ensure that copies made and retained as an automatic by-product of the transmission process do not render a transmission ineligible for the exemption.

Paragraph (E)(i) requires that beneficiaries of the exemption institute policies regarding copyright; provide information materials to faculty, students, and relevant staff members that accurately describe and promote compliance with copyright law; and provide notice to students that materials may be subject to copyright protection. These requirements would promote an environment of compliance with the law, ensure that participants in the instructional process were aware of their responsibilities in using copyrighted material, and prevent unintentional and uninformed acts of infringement.

Paragraph (E)(ii) requires that the transmitting institution apply measures "that reasonably prevent unauthorized access to and dissemination of the work," and that the institution "not intentionally interfere with technological measures used by the copyright owner to protect the work." These requirements reflect the central role that the use of technological measures plays in the balance that has been struck in this bill.

A number of concerns have been expressed to the Copyright Office regarding this provision. The educator community has pointed out that requiring institutions to apply measures that reasonably prevent access to a work essentially repeats the requirement that the transmission be "made solely for, and to the extent technologically feasible, the reception of such transmission [be] limited to" the intended recipients. This may be a valid concern that should be given further consideration.

Content owners, for their part, have expressed concern about the use of the word "intentionally" in the context of interfering with technological measures used by the copyright owner. Subjective intent is difficult to prove, and could render the requirement of noninterference meaningless. This appears to be a valid concern that merits further consideration. Specifically, the Committee may wish to consider substituting an objective standard for the current subjective one - e.g., "does not engage in conduct that could reasonably be foreseen to interfere with technological measures."

It has also been suggested that language derived from 17 U.S.C. 512(i) be added to this paragraph (or as a new paragraph) to require both noninterference with and accommodation of "standard technical measures" in order to be eligible for the exemption. While the requirement in the bill of noninterference with a copyright owner's technological protection measures coupled with existing prohibitions on circumvention of access control measures in 17 U.S.C. 1201 should provide a substantial level of protection for right holders, it is possible that the case could be made for inclusion of the stricter obligation in section 512(i).

Section 3. Ephemeral Recordings

Section 3 of the bill amends 17 U.S.C. 112 by adding a new subsection which permits an educator to upload copies of a copyrighted work onto a server solely to facilitate transmissions permitted under section 110(2). Limitations have been imposed upon the exemption similar to those set out in other subsections of section 112. Paragraph 112(f)(1) specifies that any such copy be retained and used solely by the entity that made it and that no further copies be reproduced from it except the transient copies permitted under section 110(2). Paragraph 112(f)(2) requires that the copy be used solely for transmissions authorized under section 110(2). Paragraph 112(f)(3) prohibits a body or institution from intentionally interfering with technological protection measures used by the copyright owner to protect the work.

The exemption only applies to "a work that is in digital form." Consequently, it is not possible under the proposed subsection to scan a literary work, or otherwise convert a work to digital form. Use of works in digital form on the Internet bears well-documented risks for right holders. Some right holders may choose not to expose themselves to that risk by refraining from "going digital." This exemption is not intended to force those right holders to "go digital" against their will.

In our Report, we recommended that section 112 be amended to allow a single ephemeral recording to carry out a transmission permitted under section 110(2). However, the technology of digital streaming requires that more than one ephemeral copy be maintained on a server. Consequently, we support the bill's expansion of the ephemeral recording exemption to include multiple

copies. It is the view of the Copyright Office that the safeguards built into the proposed subsection, including the extremely limited purposes for which ephemeral recordings may be used, provide adequate assurance that the additional copies authorized by the subsection will not have any measurable impact on content owners.

Section 4. Implementation by Copyright Office

Subsection (a) states that not later than two years after the date of enactment of this Act, the Copyright Office shall conduct a study and submit a report to Congress on the status of licensing by private and public educational institutions of copyrighted works for digital distance education programs, including live interactive distance learning classes, faculty instruction recorded without students present for later transmission, and asynchronous delivery of distance learning over computer networks, and also on the use of copyrighted works in such programs. We caution that much of this information is considered proprietary and will be difficult to obtain. Although such a report could be very valuable to the Committee to the extent that empirical evidence can be obtained, this may not be possible in many instances.

Subsection (b) requires the Copyright Office, not later than two years after the date of enactment, to convene a conference of interested parties, including representatives of copyright owners, nonprofit educational institutions and nonprofit libraries and archives to develop guidelines for the use of copyrighted works for digital distance education under the fair use doctrine and sections 110(1) and (2). The conference would initiate a process that has as its goal the promulgation by the Copyright Office of guidelines for the fair use of copyrighted works in digital distance education.

The Copyright Office believes that fair-use guidelines for particular areas of activity have proved useful in the past, and digital distance education is an area where development of new guidelines certainly would be appropriate. We support such a Congressionally-mandated process to establish fair-use guidelines for digital distance education. Since guidelines do not have the force of law, their success in practice depends largely on the degree to which interested parties endorse them. A strong message from the Congress to the affected parties that guidelines are desirable, as evidenced by subsection (b), could play a pivotal role in the eventual success of such an effort.

The Copyright Office is concerned, however, about the inclusion of sections 110(1) and (2) as subjects for the guidelines, as they are specific exemptions with delineated parameters. The Office would propose that these sections be removed from the scope of the conference and addressed through informational materials of the type regularly issued by the Copyright Office.

Conclusion

The Copyright Office supports this legislation to carry out the recommendations made in its 1999 Report. We look forward to continuing to work with the Committee in this important endeavor.

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