

A CYBERSPACE UPDATE II: ACADEMIC ISSUES
Distance Education

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Advances in computer technology over the past 15 years, including in particular the rapidly increasing power and decreasing cost of computers and the dramatic growth and seeming ubiquity of the Internet, have, among other things, created tremendous (though sometimes overstated) new opportunities and methods for education. It is now possible – and even simple – as a technical matter to offer courses to “classes” of students who are separated from each other by both geography and time and in “classrooms” that exist wherever (and everywhere) there is a computer.

Copyright law, however, has proved to be a significant impediment to the full realization of the promise of distance education. The only provision of the Copyright Act that specifically authorizes the use of copyrighted works in distance education, 11 U.S.C. § 110(2), was written a quarter of a century ago and is limited in its scope largely to the educational technologies that existed then – live satellite transmissions from one classroom to another. Moreover, even that provision is considerably narrower in its authorizations than § 110(1), which governs the use of copyrighted works in the course of face-to-face teaching activities.

As the disjunction between law and technology became increasingly problematic for educators, Congress, as part of the Digital Millennium Copyright Act of 1998, directed the Register of Copyrights to consult “with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives” and then to “submit . . . recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works”. Digital Millennium Copyright Act, § 403(a), Pub. L. No. 105-304, 112 Stat. 2860

(1998) (uncodified provision). Following extensive hearings, the Register submitted her report, which called for a significant update and expansion of existing § 110(2) to meet modern realities. Report on Copyright and Digital Distance Education (1999), available online at <http://www.loc.gov/copyright/docs/de_rprt.pdf>. In particular, the Register noted that existing law embodies “a policy determination that performances or displays of copyrighted works in the course of systematic instruction should be permitted without the need to obtain a license or rely on fair use”, but that, “[w]ithout an amendment to accommodate . . . new technologies, the policy behind the law will be increasingly diminished”. Id. at xv.

Although the content owner community opposed the Register’s initial recommendations, further negotiations among the relevant stakeholders ultimately resulted in a bill, the Technology, Education, and Copyright Harmonization Act of 2001 (the “TEACH Act”), that was designed to “updat[e] the distance education provisions of the Copyright Act for the 21st Century”, S. Rep. 107-3, 107th Cong, 1st Sess. (2001) at p. 3; that was widely supported by educational institutions, libraries, and content owners alike; and that had broad bipartisan support in Congress as well. S. 487, 107th Cong., 1st Sess. (2001), available online at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.00487:>>. (A side-by-side comparison of S. 487 to existing law appears at the end of this outline.) Progress on the bill stalled, however, as other issues came to the fore after September 11, and it is uncertain when (and perhaps even whether) further legislative action will take place.

In the meantime, those wishing to engage in distance education beyond the limited scope permitted by existing § 110(2) must rely either on licensing – which can be difficult, time-consuming, and often prohibitively expensive – or on fair use – which, while “fully applicable to uses of copyrighted works in the digital environment, including in distance education”, Report on Copyright and Digital Distance Education at xi (1999), available online at <http://www.loc.gov/copyright/docs/de_rprt.pdf>, is always vague and fact-specific. Nevertheless, the provisions of the TEACH Act and those of earlier efforts to develop similar “safe harbors”, see, e.g., Draft Educational Fair Use Guidelines for Distance Learning (1996), available online at <<http://www.utsystem.edu/ogc/intellectualproperty/distguid.htm>>, suggest some useful parameters. Among other

things, limiting access to registered students by means of passwords or similar measures; terminating students' access at the end of the class term; using technologies, such as streaming, that make "downstream" copying and redistribution more difficult; including copyright notices; and informing students generally of their rights and responsibilities under copyright law would all strengthen a fair use argument. See generally Georgia Harper, Rules of Thumb for Displaying and Performing Others' Works in Distance Learning, available online at <<http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm#distance>>.

For further information on these and general copyright issues, the following resources are particularly helpful:

A Crash Course in Copyright

<http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm>

An extensive collection of practical advice, a "crash tutorial", and other useful, plain English materials on copyright issues, focusing primarily on the academic setting

©copyown and ©copyfair

<http://www.inform.umd.edu/copyown>

<http://www.inform.umd.edu/copyfair>

A wealth of sample policies and other resources on the issues of copyright ownership and fair use in higher education

Copyright Law & Graduate Research

<http://www.umi.com/hp/Support/DEXplorer/copyright>

A good overview of the copyright rights and responsibilities of dissertation authors

Center for Intellectual Property and Copyright in the Digital Environment

<http://www.umuc.edu/distance/odell/cip>

Materials, online workshops, and other resources on digital copyright issues

10 Big Myths About Copyright Explained

<http://www.clari.net/brad/copymyths.html>

A good, basic primer on copyright law and the Internet

The United States Copyright Office

<http://www.loc.gov/copyright>

Information, copyright registration forms, and more from the people in charge; in particular, see “Reproduction of Works by Educators and Librarians”, an information circular available at <<http://www.loc.gov/copyright/circs/circ21.pdf>>; and “Copyright Search”, a tool for identifying the copyright owner of a given work, at <<http://www.loc.gov/copyright/search/>>

When Works Pass into the Public Domain

<http://www.unc.edu/~unc1ng/public-d.htm>

A handy reference chart on this surprisingly thorny issue

Copyright Permission Page

<http://www.law.wfu.edu/library/copyright>

Advice on how to obtain copyright permissions, sample request forms, and links to online permission offices

Copyright Clearance Center

<http://www.copyright.com>

Online access to the rights organization of the same name

Digital Future Coalition

<http://www.dfc.org>

A good source of information on current copyright legislation and issues from an advocacy group dedicated to an “international copyright law and policy that rewards and promotes creativity”

Stanford University Libraries’ Fair Use Site

<http://fairuse.stanford.edu>

A virtual law library of copyright-related materials

**A COMPARISON OF EXISTING AND PROPOSED LAW GOVERNING
THE USE OF COPYRIGHTED MATERIALS IN INSTRUCTIONAL ACTIVITIES**

CURRENT LAW (11 U.S.C. § 110(1))	CURRENT LAW (11 U.S.C. § 110(2))	TEACH ACT (S. 487)
Applies to nonprofit educational institutions	Applies to nonprofit educational institutions	Applies to accredited nonprofit educational institutions
Permits the display of any work	Permits the display of any work	Permits the display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session
Permits the performance of any work	Permits the performance of nondramatic literary and musical works	Permits the performance of nondramatic literary and musical works and reasonable and limited portions of any other works
(No similar provision)	(No similar provision)	Excludes performance and display of works produced or marketed primarily for performance or display as part of mediated instructional activities [#] transmitted via digital networks
Performance or display of a motion picture or other audiovisual work cannot be made by means of a copy that was made unlawfully if the person responsible for the performance or display knows or has reason to believe that the copy was made unlawfully	(No similar provision)	Performance or display cannot be made by means of a copy that was made or acquired unlawfully if the institution knows or has reason to believe that the copy was made or acquired unlawfully

Performance or display must be made in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction	Performance or display must be by or in the course of a transmission made primarily for reception in classrooms or similar places normally devoted to instruction	Performance or display must be by or in the course of a transmission made solely for, and to the extent technologically feasible reception of which is limited to, students officially enrolled in the course for which the transmission is made
Performance or display must be made by an instructor or pupil	(No similar provision)	Performance or display must be made by, at the direction of, or under the actual supervision of an instructor
(No similar provision)	Performance or display must be: * directly related and of material assistance to the teaching content of the transmission * a regular part of the systematic instructional activities of the institution	Performance or display must be: * directly related and of material assistance to the teaching content of the transmission * an integral part of a class session offered as a regular part of the systematic mediated instructional activities [#] of the institution
(No similar provision)	(No similar provision)	Transmitting institution must: * institute policies regarding copyright * provide faculty, students, and relevant staff with informational materials that accurately describe and promote compliance with copyright law * provide notice to students that materials used in connection with the

		course may be subject to copyright protection
(No similar provision)	(No similar provision)	<p>In the case of digital transmissions, transmitting institution:</p> <ul style="list-style-type: none"> * must employ technological measures that reasonably prevent recipients from retaining the work in accessible form for longer than the class session and further disseminating the work to others without authorization * must not interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination

The term “mediated instructional activities” means activities that are an integral part of the class experience, that are controlled by or under the actual supervision of the instructor, and that are analogous to the type of activities that would take place in a live classroom setting, other than activities that use works such as textbooks, course packs, and similar materials in any media that typically are purchased by students for their independent use and retention.