

THE TEACH ACT: RECOGNIZING ITS CHALLENGES AND OVERCOMING ITS LIMITATIONS

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I. INTRODUCTION

America's geo-political and economic stature as a world super-power has been achieved, at least in part, due to the tremendous contribution that educational institutions, particularly institutions of higher education, have made to the nation. Whether one considers the Morrill Act of 1890,¹ which paved the way for land grant institutions across the country, the 1944 GI Bill,² authorizing post-secondary education assistance to millions of American veterans, or the National Defense Education Act passed in 1958³—which, in response to the Soviet Union's launch of Sputnik, prompted federal support for student loans, graduate fellowships, and efforts to improve science, mathematics, and foreign language education—it is apparent that Congress has regarded the country's educational capacity as a vital governmental interest.

The latter part of the twentieth century may be regarded as the era which ushered in the information age, offering challenges and opportunities for educational institutions across the country. Moreover, the information age has signaled the need for the nation's colleges and universities to thoughtfully examine the approaches used to exploit technological advancements in the interest of achieving continued success in education at every level.

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1. Morrill Act of 1890, ch. 841, 26 Stat. 417 (1890).
2. Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (1944).
3. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

One such technological advancement is the Internet. This paper examines the scope of concerns that confront implementation of the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act)⁴—a legislative effort both to expand the permissible uses of copyrighted information over the Internet and to regulate the use of those materials on the Internet to protect the interests of copyright owners. While much has already been written setting forth the directives of the TEACH Act,⁵ we seek to review the obstacles and challenges of the Act and then determine whether it is possible and advisable to develop a universal set of “best practices” or guidelines that will facilitate the use of copyrighted material via the Internet.

II. CONGRESS INTERVENES

While the classroom setting is the traditional place where learning occurs, today we see the propagation of distance education through the use of digital technologies⁶ as an equally viable vehicle in the pursuit of a more educated population. Because distance education has far-reaching implications for every segment of the population in the United States, the capabilities of digital technologies have captured the attention of both the educational community and the general public.⁷ While the Copyright Act of 1976⁸ was a welcome update for users of copyrighted information in the traditional classroom, § 110(2) of the Act did not accommodate the demands of distance education.

4. Technology, Education, and Copyright Harmonization Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1910 (2002) (codified as 17 U.S.C. § 110(2), 112(f) (2005)) [hereinafter *TEACH Act of 2002*].

5. KENNETH D. CREWS, NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT (2002), <http://www.ala.org/ala/washoff/WOissues/copyrightb/federallegislation/distanced/teachsummary.pdf>; North Carolina State University’s TEACH Toolkit: An Online Resource for Understanding Copyright and Distance Education, <http://www.lib.ncsu.edu/scc/legislative/teachkit> (last visited Apr. 10, 2007); GEORGIA HARPER, THE TEACH ACT FINALLY BECOMES LAW (2002), <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>; LAURA N. GASAWAY, TEACH ACT COMPARISON: SECTIONS 110(1)-(2) (2002), <http://www.unc.edu/~unclng/TEACH.htm>; ANN SPRINGER, AAUP: COPYRIGHTS & WRONGS (2006), <http://www.aaup.org/AAUP/protectrights/legal/topics/copy.htm>; David T. Drooz, North Carolina State University, Address at NACUA Continuing Legal Education Workshop: Copyright Update: TEACH Act Implementation and Downstream Controls (Nov. 10, 2005).

6. U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999), http://www.copyright.gov/reports/de_rprt.pdf (noting that “distance education is a form of education in which students are separated from their instructors by time and/or space.” *Id.* at 10. Also, the report noted “the term ‘distance education’ appears to focus most clearly on the delivery of instruction with a teacher active in determining pace and content . . .”).

7. *Promoting Technology and Education: Turbo-Charging the School Buses on the Information Highway: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearings of March 13, 2001*].

8. An Act for the general revision of the Copyright Law, Title 17 of the United States Code, and for other purposes (Copyright Act of 1976), Pub. L. No. 94-553, 90 Stat. 2541 (1974) (codified as 17 U.S.C. § 101 (2005)).

Whether the use of digital technologies in distance education required lawmakers to revisit the scope of copyright law was debated prior to passage of the 1998 Digital Millennium Copyright Act (DMCA).⁹ Unable to resolve the concern, in § 403 of the DMCA, the Copyright Office was directed to consult with various stakeholders, including non-profit educational institutions, copyright owners, non-profit libraries, and archives to develop recommendations to submit to Congress regarding the promotion of distance education through digital technologies.¹⁰ The result would be a study codified in the 1999 Report on Copyright and Digital Distance Education, which would serve as the basis for Senate Bill 487.¹¹

The Report of the House of Representatives, which accompanied the House version of Senate Bill 487, stated that “[t]he technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods for instruction.”¹² The reports from both chambers of Congress on this issue noted that amendment of the Copyright Act was necessary to exploit the new educational opportunities presented by digital transmission technologies, which would provide interactive educational experiences to students unable to attend classes at an institution’s physical location.¹³ Likewise, an amendment of the Copyright Act of 1976 was arguably necessary to respond to the new risks for owners of copyrighted work precipitated by the potential rapid dissemination of digital transmission technologies, i.e., transmission of copyrighted materials via the Internet.¹⁴

Senate Bill 487—the TEACH Act—therefore emerged as a seemingly worthy amendment to the Copyright Act of 1976. The TEACH Act extended the distance education exemption to cover mediated instructional activities transmitted by digital networks—distance education—by amending §§ 110(2) and 112 of the Copyright Act.¹⁵

9. S. REP. NO. 107-31, at 5 (2001); H.R. REP. NO. 107-687, at 3 (2002).

10. *Id.*

11. *Technology, Education, and Copyright Harmonization Act of 2001: Hearing on S. 487 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. of the Judiciary*, 107th Cong. 7 (2001) [hereinafter *Hearings of June 27, 2001*] (statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States, Library of Congress), available at <http://judiciary.house.gov/media/pdfs/printers/107th/73473.pdf>. According to the testimony of Ms. Peters, the Copyright Office and representatives of the constituent groups were charged “to submit to Congress a report 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.” *Id.* at 14.

12. H.R. REP. NO. 107-687, at 3 (2002).

13. *Id.*

14. *Id.*

15. *Hearings of June 27, 2001, supra* note 11, at 16. As stated in Ms. Peters’ testimony, “Mediated Instructional Activities” is “intended to convey activity where there is a teacher or an instructor at the center and students that may be other places.” *Id.* Moreover, the statute defines the phrase “Mediated Instructional Activities” as “activities that use such [permitted] work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting.” 17 U.S.C. § 110(10) (2005).

More specifically, the purpose of the TEACH Act as set forth in the June 5, 2001, Senate Judiciary Committee Report 107-31 and the September 25, 2002, House Committee on the Judiciary Report 107-687, is to allow the deployment of advanced digital transmission of technologies for the improvement of student education, while introducing safeguards to limit the risks to copyright owners relative to the dissemination of works in digital form.¹⁶ The deployment of digital transmission technologies, like the Internet, has positive implications for distance education and the advancement of education in general, because instructional transmissions between student and teacher separated in place, and perhaps time, is possible.¹⁷ However, the introduction of safeguards to protect the interests of copyright owners deserves additional review in order to examine whether such safeguards undermine the viability and effectiveness of the TEACH Act, particularly because TEACH Act requirements remain difficult to pinpoint and implement.¹⁸

The safeguards presented by the TEACH Act begin by requiring that transmission be limited to either students officially enrolled in the course for which the transmission is made, or governmental employees as part of their official duties or employment.¹⁹ Institutions using digital technologies under the TEACH Act's expanded exemption must institute policies regarding copyrights and provide information to students, faculty, and relevant staff members that describe and promote compliance with the law.²⁰ Also, § 110(2)(D) of the Act requires institutions involved in digital transmissions to implement "technological measures" to prevent: (i) retention of the copyrighted work in accessible form by recipients to which the work is sent for longer than the class session; and (ii) unauthorized further dissemination of the work in accessible form by such recipients.²¹ Finally, the institution must not "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."²²

Questions raised at the March 13, 2001, Senate Judiciary Hearing²³ prior to passage of the TEACH Act offer some insight into the impact that application of the "safeguards" may have on colleges and universities. Vermont Senator Patrick Leahy asked, *inter alia*: what "technological measures" reasonably could be

16. H.R. REP. NO. 107-687, at 2 (2002).

17. H.R. REP. NO. 107-687, at 2-3 (2002).

18. See ASS'N OF RESEARCH LIBRARIES, KNOW YOUR COPYRIGHTS: USING WORKS IN YOUR TEACHING—WHAT YOU CAN DO: TIPS FOR FACULTY & TEACHING ASSISTANTS IN HIGHER EDUCATION 4 (2007), <http://www.knowyourcopyrights.org/bm~doc/kycrbrochurebw.pdf> ("Although a specific copyright exemption known as the TEACH Act may apply, its rigorous requirements have prompted most instructors to rely primarily on fair use to display or perform works in distance education (e.g., online or over cable TV).").

19. 17 U.S.C. § 110(2)(C) (Supp. IV 2004). The TEACH Act effectively expanded the locations at which transmission could be received beyond classrooms and places devoted to instruction. S. REP. NO. 107-31, at 4 (2001).

20. 17 U.S.C. § 110(2)(D)(i) (Supp. IV 2004).

21. 17 U.S.C. § 110(2)(D)(ii)(I) (Supp. IV 2004).

22. 17 U.S.C. § 110(2)(D)(ii)(II) (Supp. IV 2004).

23. *Hearings of March 13, 2001, supra* note 7.

expected to prevent unauthorized downstream use of copyrighted works;²⁴ what obligation educational institutions had to prevent students from freely downloading materials transmitted;²⁵ and what degree of protection would be a “reasonable” effort to prevent unauthorized access under the TEACH Act.²⁶ Questions from South Carolina Senator Strom Thurmond centered on: a) what costs educational institutions would incur to comply with the required protective measures;²⁷ b) whether educational institutions would be confronted with litigation over whether their technological measures were reasonable;²⁸ and c) whether options are available to address choice of law problems that may result from disputes related to the transmission of digital technology abroad.²⁹ These questions reflect the challenges that colleges and universities may face in implementing safeguards that limit the risks of retention and dissemination of digitally formatted works of copyright owners, while at the same time attempting to enhance the viability of distance education and assist faculty in utilizing the latest technology as teaching tools. Hence, lawyers and administrators representing the interests of educational institutions should carefully examine the obligations and challenges of the TEACH Act and beware if they choose to adopt and embrace its requirements.³⁰

III. CHALLENGES AND OBLIGATIONS

Like most legislation, the TEACH Act is not the most readable document proffered by Congress. Although the actual amendment is relatively short when compared with other legislative enactments, the Act’s twists, turns, and various nuances make it difficult to grasp for lay persons, lawyers, and lawmakers.³¹

24. *Id.* at 45.

25. *Id.* at 49.

26. *Id.*

27. *Id.* at 61.

28. *Id.* at 63.

29. *Id.*

30. See COPYRIGHT CLEARANCE CTR., THE TEACH ACT: NEW ROLES, RULES AND RESPONSIBILITIES FOR ACADEMIC INSTITUTIONS (2005), <http://www.copyright.com/media/pdfs/CR-Teach-Act.pdf>.

Ultimately, it is up to each academic institution to decide whether to take advantage of the new copyright exemptions under the TEACH Act. This decision should consider both the extent of the institution’s distance education programs and its ability to meet the education, compliance and technological requirements of the TEACH Act.

Id.

31. See Kristine H. Hutchinson, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2204 (“[T]he Act is fraught with requirements and vague terminology, which have caused confusion amongst educational institutions and have resulted in the failure to take advantage of the Act”); KENNETH D. CREWS, NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT 9 (2002), <http://www.ala.org/ala/washoff/WOissues/copyrightb/distanceed/teachsummary.pdf> (describing the “convoluted language of the bill”); GEORGIA HARPER, THE TEACH ACT FINALLY BECOMES LAW (2002), <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm#top> (“This disparity [between what the statute authorizes for face-to-face teaching and for distance education], coupled with the considerable number of additional limits and conditions imposed by the statute, may lead some educators to conclude that it’s more trouble than it’s worth to rely on Section

There are, however, those who have ferreted through the legalese and legislative jargon to interpret, and bring some semblance of clarity to the amended § 110(2) of the Copyright Act.³² Despite these helpful efforts at clarification, and presumed knowledge of the Act by a broad cross-section of colleges and universities, the question remains whether the clarifications suffice to convince college and university attorneys and administrators that implementation of the Act is viable, reasonable, and useful, i.e., that the challenges and obligations are not overwhelming.

The “slow start” of colleges and universities in their efforts at interpreting and implementing the TEACH Act suggested even to proponents of the law that determining the meaning of the law’s provisions would be quite a task, requiring a collective effort from lawyers and copyright experts.³³ Some college and university attorneys have indicated that while they were familiar with the Act, and had in some instances started to incorporate the Act’s requirements into their overall copyright policies,³⁴ they too were beleaguered by the Act’s lack of clarity.³⁵

In adapting to the arguably stringent oversight provisions of the TEACH Act, academic administrators have to be concerned about finding and striking the delicate balance between the need to monitor instructors’ use of copyrighted material to ensure compliance with the Act, juxtaposed against questions of academic freedom and the faculties’ likely resistance to “jump[ing] through all the hoops that are required for TEACH Act compliance.”³⁶

Mirroring Senator Leahy’s concerns,³⁷ some college and university counsel have pointed to the costs and uncertainty of developing strategies to address the requirement that academic institutions implement “technological measures” that “reasonably prevent” students from retaining the works beyond the class session and further distributing them;³⁸ suggesting that in practice, such measures are often simply not available, too costly in light of the uncertainty of the mandate,³⁹ and

110(2).”)

32. See sources cited *supra* note 5. See also Dan Carnevale, *Slow Start for Long-Awaited Easing of Copyright Restriction: A Copyright Checklist for Online Courses*, CHRON. HIGHER EDUC., Mar. 28, 2003, at A29.

33. See *id.*

34. Information compiled from responses of college and university counsel to an informal survey of NACUA member institutions [hereinafter *Informal Survey*] (on file with authors).

35. *Id.*

36. *Id.* See also CREWS, *supra* note 5, at 3 (“[T]hese circumstances will probably motivate institutions to become more involved with oversight of educational programs and the selection and use of educational materials. This substantive oversight may raise sensitive and important issues of academic freedom.”).

37. *Hearings of March 13, 2001*, *supra* note 7, at 104.

38. 17 U.S.C. § 110(2)(D)(ii)(I) (2000 & Supp. IV 2004).

39. Some experts believe that using password protection should suffice. Some college and university administrators think institutions will have to invest in technology that can track what students do with the copyrighted material after they download it—technology that may not exist yet. See Carnevale, *supra* note 32. But see Hutchinson, *supra* note 31, at 2211–12 (arguing that the TEACH Act is an effective way to combat the high costs of “securing the rights to use

place an inequitably higher burden on institutions,⁴⁰ as the lion's share of the benefits from the Act's mandates are those going to copyright owners.⁴¹

Finally, it is clear that the TEACH Act is not the panacea. It does not provide all of the answers to use of copyrighted material via the Internet, and the concomitant protection of the interests of the owners of that material. In fact, one commentator aptly advises us that there "is still a considerable gap between what the statute authorized for face-to-face teaching and for distance education."⁴² For instance, while a professor may perform any works related to the curriculum in face-to-face classroom teaching—including still images, music, and movies—without permission or limitations, the same is not true for transmission over the Internet, which limits display of audiovisual works and dramatic musical works to "reasonable and limited portions,"⁴³ i.e., clips.⁴⁴

With these obstacles and concerns reverberating throughout the academy, and considering the number of public and private academic institutions that both utilize the Internet and offer distance education courses⁴⁵—numbers that will likely continue to increase⁴⁶—there remains a real question about whether the TEACH Act can address the concerns of users and owners of digital and/or electronic copyrighted materials. Does the Act clearly set forth the steps that need to be taken for compliance? Will the broad protections afforded copyright owners overshadow the Act's viability such that fair use,⁴⁷ licensing, permission requests, and other known solutions are both preferred and more reasonable?⁴⁸ What about

copyrighted materials").

40. See Hutchinson, *supra* note 31, at 2222–23. See also HARPER, *supra* note 5 (emphasizing "the 22(!) prerequisites" of the TEACH Act).

41. *But see* Hutchinson, *supra* note 31, at 2207 (stating that "the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future").

42. HARPER, *supra* note 5.

43. 17 U.S.C. § 110(2) (2000 & Supp. IV 2004).

44. HARPER, *supra* note 5.

45. BERNARD R. GREENE, DISTANCE EDUCATION AT DEGREE-GRANTING POSTSECONDARY INSTITUTIONS: 2000–2001 (2003), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003017>.

46. "[The] AAUP has addressed the issue, recognizing that the existence of distance education is not a future possibility, but a current reality where growth potential is virtually unlimited." AM. ASS'N OF UNIV. PROFESSORS, AAUP: SAMPLE DISTANCE EDUCATION POLICY & CONTRACT LANGUAGE, <http://www.aaup.org/AAUP/issued/DE/sampleDE.htm> (last visited Apr. 10, 2007).

47. 17 U.S.C. § 107 (2000 & West Supp. 2005). *Cf.* HARPER, *supra* note 5 (suggesting that the limitations of the TEACH Act will not suffice in most situations, and that educators still have recourse to fair use when utilizing the copyrighted materials of others, as "the four factor fair use test seems, well, simple and elegant"). See also Christopher L. Ashley, *The TEACH Act: Higher Education Challenges for Compliance*, EDUCAUSE CTR. FOR APPLIED RESEARCH BULLETIN, June 22, 2004, at 1, available at <http://www.educause.edu/ir/library/pdf/ERB0413.pdf>. *But see* SPRINGER, *supra* note 5. Springer suggests that "the [fair use] doctrine is 'so flexible as virtually to defy definition.'" *Id.* (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968)). See also Brendan T. Kehoe, *The TEACH Act's Eligibility Requirements: Good Policy or A Bad Compromise?*, 71 BROOK. L. REV. 1029, 1044 (2005) (stating that "[f]air use is an equitable defense that is inexact by definition.>").

48. See HARPER, *supra* note 5.

the costs? And in any event, based upon the historic paucity of copyright litigation against the academy⁴⁹, is there a genuine reason for colleges and universities to be concerned about compliance with this new amendment to the Copyright Act, i.e., are there substantive penalties or the real threat of liability for failure to comply that provide the needed incentive to academic administrators as well as educators?⁵⁰

Standing alone, the Act contains complicated language. Thus, absent some effort to clarify the Act for institutions and their faculty and students, frustration rather than implementation will likely prevail. In such a case, the “slow start” experienced by many colleges and universities in embracing the TEACH Act will likely continue.

A key issue for many institutions is that the TEACH Act does not define “reasonable.”⁵¹ Moreover, “technological measures”—another undefined term—must be developed and/or employed by institutions that “reasonably” prevent recipients of the material (i.e., students) from retaining the works beyond the class session and further distributing them.⁵² Absent guidance as to how this “vague terminology”⁵³ is contextually defined, neither the Act’s viability, nor the likelihood that institutions will readily invest the time⁵⁴ and resources⁵⁵ necessary to implement the requirements of the Act in their institutions, can be assured.

49. See Stephana I. Colbert & Oren R. Griffin, *The Impact of “Fair Use” in the Higher Education Community: A Necessary Exception?*, 62 ALB. L. REV. 437 (1998). See also Dan Carnevale, *Colleges Are Unconcerned by Online Author’s \$2.6-Billion Copyright Lawsuit*, CHRON. HIGHER EDUC., Mar. 22, 2002, at A36. But see, Ann Springer, *AAUP: Copyrights & Wrongs* (2006), <http://www.aaup.org/AAUP/protectrights/legal/topics/copy.htm?PF=1> (citing Carnevale, *supra* note 49; Mitchell v. AOL Time Warner Inc., 2002 U.S. App. LEXIS 26313 (9th Cir. Dec. 13, 2002)) (suggesting that while colleges and universities providing servers may not be liable for the copyright infringement of their faculty and others within their academic communities, because “they are only involved as owners of the servers, not controllers of the individual websites . . . the faculty or other members of the university community . . . could be liable for copyright infringement”). Absent a policy and practice that advises faculty, staff, and students of their copyright obligations and responsibilities, will institutions find themselves indemnifying their faculty for acting within the scope of their employment? See discussion in Part III.

50. Cf. Carnevale, *supra* note 32. In this article, John Vaughn, executive vice president of the Association of American Universities, seems to suggest that academic institutions “are too concerned about liability,” and Allan Robert Adler, vice president for legal and governmental affairs at the Association of American Publishers, likewise seems to suggest that “most publishers are unlikely to sue the moment colleges begin testing the law—unless the publishers find flagrant violations.” *Id.* at A29.

51. 17 U.S.C. § 110(2)(D) (2005).

52. 17 U.S.C. § 110(2)(D)(ii)(I) (Supp. IV 2004).

53. See Hutchinson, *supra* note 31, at 2204. See also Ashley, *supra* note 47, at 8 (“What is reasonable today may not be reasonable in the future as technology evolves.”).

54. *Informal Survey*, *supra* note 34 (“[T]he only significant barrier that I am aware of is finding the time to address the steps needed to put this in place on our campus.”).

55. *Id.*; see also Carnevale, *supra* note 32 at A29 (“Some college administrators think institutions will have to invest in technology that can track what students do with the copyrighted material after they download it—technology that may not exist yet.”).

Further, while the TEACH Act is a clear acknowledgement that § 110 of the Copyright Act did not anticipate the use of copyrighted materials on the Internet, the Act's long list of requirements⁵⁶ is at best a significant challenge and at worst so cumbersome that institutions and instructors will simply ignore it.⁵⁷ The Act provides a seemingly endless list of tasks to go around, starting with the requirement that in order to simply qualify to take advantage of the Act's benefits, the institution must be a nonprofit accredited academic institution or governmental agency.⁵⁸ There are responsibilities that must be borne by the institution,⁵⁹ as well as technology officials,⁶⁰ and instructors.⁶¹ Somehow, this long list of dos and don'ts must be made manageable so that all players willingly assume their relevant tasks. While the threat of punitive action—lawsuits and/or some form of discipline for violation—may have some effect,⁶² it is unlikely to produce the desired result. In fact, even if there is a viable threat of liability, many within the academy may determine that the easier, albeit far less desirable decision, is to forego the use of copyrighted materials in their classrooms.

Although the choice to forego the use of copyrighted materials when utilizing the Internet may be an unlikely extreme, the groundswell of opinion seems to be that at the very least, the current language of the TEACH Act dictates initial, serious consideration of alternatives such as fair use,⁶³ permissions, and licensing,⁶⁴ either in conjunction with, or before turning to, the TEACH Act.

56. See SPRINGER, *supra* note 5.

57. See *Informal Survey*, *supra* note 34 (“The benefit of the TEACH Act over a fair use analysis is, I would say, marginal”; “Copyright remains a handicap for online teaching and the TEACH Act is no solution because it requires too much work for compliance.”).

58. 17 U.S.C. § 110(2) (2000 & Supp. IV 2004). See *generally* Kehoe, *supra* note 47, at 1054–63.

59. See CREWS, *supra* note 5, at 6. For instance, fashioning a copyright policy which provides “informational materials” regarding copyright, and providing notice to students that materials used in a course may be subject to copyright protection.

60. *Id.* at 7 (creating a system that permits access only by students registered for a specific course; and identifying and applying “technological measures” to prevent the retention or further dissemination of works by those to whom the works are transmitted).

61. *Id.* at 8–10 (stating that instructors select course content within the parameters of the Act, oversee the planning and conduct of the distance education program, ensure that the materials being used are an “integral part of the class experience,” and that analog works are only digitized under certain conditions).

62. See *infra* Part IV.

63. 17 U.S.C. § 107 (2000 & West Supp. 2005). This provision states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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

While likely unintentional, the Act's difficulties remain; and the result is that the interests of the copyright owners appear to be paramount to, and in fact "trump," the interests of users of the copyrighted information.⁶⁵ Where the use of copyrighted material is for commercial benefit, such a result is justified, as those who want to exploit the works of copyright owners for financial gain should pay for that right. However, if the furtherance of the country's educational mission is a legitimate goal and objective—a "vital governmental interest"⁶⁶ as we first suggested—it is surprising that the interest of educating our citizens so that we might maintain our position as a world super-power would take a back seat to the financial interests of copyright owners.

These difficulties of compliance may be compounded by the costs. For some institutions, the costs of implementing the directives of the Act can be as much of an impediment as the lack of clarity.⁶⁷ Most academic institutions—small, private, community college, large research university, or Ivy League institution—utilize the Internet either in distance education or as a teaching tool⁶⁸ in regular classroom activity. All institutions must therefore have a method by which to determine what the costs of implementing the Act will be, and whether or not the benefits of compliance with the Act justify the costs. Institutions with large operating budgets for such purposes may have the money and resources to effect compliance. However, without fashioning a way to share the expense of compliance with others, for some institutions—small, public, and community colleges—the costs could be significant and in some instances prohibitive.⁶⁹

The cost factor related to compliance with the TEACH Act may be exacerbated by the rapid changes in technology that have become almost commonplace. At the March 13, 2001 hearing before the U.S. Senate Judiciary Committee which focused on promoting technology in education, questions were raised as to the TEACH Act's requirement that educational institutions impose safeguards, and what actual technological measures minimize the risk of unauthorized downstream use.⁷⁰ While it was suggested that numerous "Digital Rights Management" (DRM) solutions were available to fight copyright piracy, there was no discussion

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

64. See sources cited *supra* note 47.

65. But see Hutchinson, *supra* note 31, at 2207 (stating that "the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future").

66. See *supra* Part I.

67. *Hearings of March 13, 2001*, *supra* note 7, at 54 (statement of Gerald A. Heeger, President, University of Maryland University College, College Park, Maryland, indicating that one could imagine the development of technological protections that were so prohibitively expensive that they are out of reach of all institutions).

68. See GREENE, *supra* note 45.

69. See Ashley, *supra*, note 47, at 5 ("Positioning an institution to benefit from the TEACH Act requires significant investment of time and resources.").

70. *Hearings of March 13, 2001*, *supra* note 7, at 52.

regarding cost—and particularly the virtual reality that developing “technological measures” will be more than a fixed, one-time cost. It is more likely, in fact, as technology continues to develop and grow in complexity, that upgrades will be required, necessitating an increase in costs.

Thus, in creating the TEACH Act, lawmakers may have trivialized the impact of cost on implementation of the Act. Even if DRM solutions or other technologies are available safeguards that comply with the TEACH Act, it is unknown whether these measures will be accessible to all colleges and universities, including those institutions already struggling to provide their students and faculty with quality computing resources; an additional unknown is whether these will be the only measures required to comply with the Act.⁷¹ Arguably, the Act does not require upgrades of “technological measures” but simply that such measures be in place. However, if new and more sophisticated technology exists, should all colleges and universities taking advantage of the Act be required to upgrade to that technology? Certainly, those institutions that can afford to will likely do so. However, the costs may cause those institutions with fewer resources to forego such upgrades—can they do so and remain compliant with the Act, or does the decision not to upgrade create greater risk of challenge from copyright owners? Because the Act is so unclear in this regard, any answer is only speculative.

From a more positive perspective, perhaps the North Carolina State University (NCSU) model will prevail, with institutions freely sharing the technology with other institutions, including any upgrades.⁷² Alternatively, if costs ultimately prohibit such generous sharing, a more global approach⁷³ might be in order: a consortium of schools, collectively providing funding to a representative subset of the group, charged with the responsibility of developing the appropriate software, monitoring its effectiveness for the purpose of compliance, and recommending and implementing upgrades as required.

These issues highlight the fact that a cost/benefits analysis is essential:

The analysis should address the role of distance education in the institution’s overall delivery of instruction; the likelihood of success in marshalling the necessary coordination of effort among faculty, administration, and IT staff, including whether existing organizational resources (for example, the campus library) and institutional procedures (for example, institutional copyright policies) can be built upon to meet TEACH Act requirements; and the feasibility of implementing the necessary technological controls.⁷⁴

Ultimately, this analysis could determine which institutions of higher learning are prohibited by costs from offering their students learning opportunities utilizing the latest technological advancements.

71. *Id.*

72. *See* North Carolina State University’s TEACH Toolkit, *supra* note 5.

73. *See infra* Part V.A. (discussing collective efforts by colleges and universities to develop solutions for compliance with the TEACH Act).

74. *Id.* at 6.

IV. WHAT POTENTIAL LIABILITY AWAITS INSTITUTIONS FAILING TO MEET THE
DEMANDS OF THE TEACH ACT

As noted earlier, at the March 13, 2001 Hearing before the Committee on the Judiciary for the United States Senate, committee members had the opportunity to propound written questions to witnesses who appeared and gave testimony.⁷⁵ Senator Strom Thurmond raised questions as to whether educational institutions would be hauled into court to litigate the “reasonableness” of technological measures implemented to satisfy the conditions of eligibility for the TEACH Act’s exemption.⁷⁶ In response, the Senator was advised that excessive litigation was unlikely because most educational institutions would make a good faith effort to institute effective technological measures to prevent unauthorized access and dissemination.⁷⁷ However, what will constitute a “good faith effort” is not defined by the Act.

Senator Thurmond’s questions raise concerns about the legal challenges copyright owners might pursue in the event that efforts to prevent unauthorized retention and dissemination fail to meet the standard of reasonableness as contemplated by copyright owners. On its face, the TEACH Act obligates educational institutions to prevent unauthorized retention and dissemination, or, put another way, protect the interests of copyright owners from infringement. Thus, it is critical that educational institutions examine the obligations that the TEACH Act imposes through the advent of technological measures as set forth in 17 U.S.C.A. § 110(2) (West Supp. 2003). More importantly, colleges and universities should understand the types of legal challenges that may result if copyright owners believe that the educational institution’s technological measures are woefully ineffective, or that the educational institution or one acting with expressed or implied authority of the institution (i.e., faculty, support staff, or students) has not acted reasonably given the apparent affirmative duty imposed by the TEACH Act.⁷⁸ Plausible allegations that could be brought against educational institutions include claims of direct infringement, contributory infringement, or vicarious liability.

75. *Hearings of March 13, 2001*, *supra* note 7, at 43–54.

76. *Id.*

77. *Id.* Specifically, the TEACH Act requires that an educational institution, in the case of digital transmissions:

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipient to others; and

(II) does not 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.

TEACH Act of 2002, *supra* note 4, at 1911.

78. Hutchinson, *supra* note 31, at 2222.

The potential liability for colleges or universities under the TEACH Act may be illustrated under facts similar to those set forth in *Kepner-Tregoe, Inc. v. Vroom*.⁷⁹ In that case, a Yale University professor was found to have violated copyright law when he used copyrighted materials from his class in another venue.⁸⁰ Like many colleges and universities across the country, Yale University hosted management training seminars that were conducted by Professor Vroom using executive leadership training materials.⁸¹ However, the training materials used in the seminars overlapped with a software program that was subject to a licensing agreement that granted plaintiff Kepner-Tregoe (K-T) exclusive use of the licensed material.⁸² While Professor Vroom argued that his use of the copyrighted material was permissible because he used the material in his own teaching and consulting work, the district court disagreed and the appellate court affirmed.⁸³ The court indicated that Dr. Vroom was allowed to use the material to teach enrolled graduate and undergraduate students, not for the executive training seminars.⁸⁴ According to the court, “Dr. Vroom willfully infringed the copyrighted material licensed to K-T and breached his contract with K-T when he taught the exclusively licensed materials to large groups of executive in the university setting.”⁸⁵

The facts in *Vroom* provide an example where it may be difficult to prevent the retention or dissemination of electronic materials consistent with the protections provided by the TEACH Act. It is foreseeable that college and university instructors and faculty members may use electronic teaching materials for other instructional activities and purposes. Could an institution that sponsors professional seminars and conferences violate the TEACH Act when a faculty presenter relies on electronic copyrighted materials routinely used in instructional lectures to convey the subject matter to students? If so, has the institution knowingly engaged in copyright infringement? In *Vroom*, the professor involved argued that he had broad and unlimited rights to use the licensed material in teaching executives in the University setting, despite the court’s interpretation of the teaching clause which limited Dr. Vroom’s teaching to bona fide enrolled undergraduate and graduate students.⁸⁶ Thus, Dr. Vroom’s use of the material for his executive training seminars resulted in a willful act of copyright infringement.

Although the plaintiff in *Vroom* did not name the University as a defendant—pursuing its action against the University’s professor instead—it is plausible under the TEACH Act that an institution could face claims of copyright infringement for the actions of faculty, or at least be required to defend and indemnify any actions against the faculty member who will undoubtedly argue that he was acting within the scope of his employment at the time of the alleged infringement. Dissemination of copyright protected materials through venues outside the

79. 186 F.3d 283 (2d Cir. 1999).

80. *Id.* at 288–89.

81. *Id.* at 285.

82. *Id.*

83. *Id.* at 285–89.

84. *Id.* at 287.

85. *Id.* at 286.

86. *Id.* at 287.

traditional classroom or distance learning setting appears to be the type of dissemination the TEACH Act is designed to prevent. However, college and university settings often host a wide range of events, some even for profit, which offer the opportunity for the institution or its faculty to run afoul of the TEACH Act's safeguards.

While the TEACH Act requires educational institutions to implement policies and distribute informational materials intended to promote compliance with copyright law, it is foreseeable that faculty, students, or staff personnel could independently engage in conduct that results in undermining the TEACH Act's protective measures. While it may appear unlikely that an educational institution would engage in conduct that might constitute direct infringement, the inherent nature of faculty and student life on college and university campuses could expose institutions to liability under the doctrines of contributory infringement and vicarious liability.⁸⁷ Contributory infringement stems from "the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor."⁸⁸ Specifically, contributory infringement is established by showing: (1) direct infringement by a primary infringer; (2) knowledge of the infringement; and (3) material contribution to the infringement.⁸⁹

Whether members of a college or university community may be capable of exposing an institution to potential liability under the TEACH Act for contributory infringement may be understood by considering the facts presented in *Online Policy Group v. Diebold, Incorporated*.⁹⁰ In *Online Policy Group*, two students from Swarthmore College gained access to certain sensitive information about Diebold, Inc. using Internet access provided by the College.⁹¹ Diebold produces electronic voting machines, the reliability of which have been the subject of public scrutiny.⁹² Discussions regarding problems with the machines were exchanged between employees through the company's internal email system.⁹³ In particular, Diebold's email archive included information about the company's proprietary computerized election systems, trade secret information, as well as employees' personal information.⁹⁴ The students posted the email archive on various websites including an online newspaper.⁹⁵ In response, Diebold issued a cease and desist

87. *Religious Tech. Ctr. v. Netcom On-Line Communic'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (stating that to be liable for direct infringement, one must actively engage and directly cause the alleged infringement).

88. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966). *See also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

89. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004).

90. 337 F. Supp. 2d 1195 (N.D. Cal 2004).

91. *Id.* at 1197.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1197-98.

letter to the College pursuant to the safe harbor provisions of the DMCA, demanding that the students remove the email archive from the school's website.⁹⁶ While Diebold objected to the students' conduct, which revealed information critical to concerns about Diebold's electronic voting machines, the students were found not to have violated copyright law.⁹⁷ Addressing the students' activity, the court indicated that the "activity might have reduced Diebold's profits because it helped inform potential customers of problems with the machines. However, copyright law is not designed to prevent such an outcome. Rather, the goal of copyright law is to protect creative works in order to promote their creation."⁹⁸

The facts in this case demonstrate how difficult it may be to police the activities of students regarding the use of institutional computing resources. What consequences might flow from such conduct under the TEACH Act? Arguably, an institution may contend that a contributory infringement claim may be defeated because it likely had no *knowledge* of the infringing activity. However, assume an employee of the college or university knew that students were using a computer in an on-campus computer lab contrary to institutional policy, but assumed that the students' actions were harmless. Due to the decentralized structure of many campuses and routine access students have to the Internet, the contributory infringement claim may pose a threat for institutions trying to comply with provisions of the TEACH Act that are intended to safeguard the interests of copyright owners. Certainly, preventing retention and dissemination of electronic and/or digital information under the TEACH Act may well prove to be challenging under facts as those presented in *Online Policy Group*. However, when faced with allegations of infringement under the Act, the academy could use the court's ruling in *Online Policy Group* to argue that, just as in determining fair use⁹⁹ there is more than one consideration, i.e., perhaps the court is saying that protection of rights of copyright owners is not the only consideration despite the significant protections afforded them under the Act.

Another cause of action that may be encountered by colleges and universities seeking to use copyrighted digital material under the TEACH Act is the vicarious liability claim. While vicarious liability stems from the common law doctrine of respondeat superior, in the context of copyright law, the doctrine does not depend on the employer-employee relationship.¹⁰⁰ To prevail on a vicarious copyright liability claim a defendant must establish two elements: the defendant must have (1) the right and ability to supervise the infringing activity; and (2) an obvious and direct financial interest in exploitation of the copyrighted material.¹⁰¹ In *Roy Export Co. Establishment v. Columbia University*,¹⁰² a bootleg copy of the film "Modern Times" starring Charlie Chaplin was shown on the Columbia University

96. *Id.* at 1198.

97. *Id.* at 1203.

98. *Id.* (citation omitted).

99. 17 U.S.C. § 107 (2000 & West Supp. 2005).

100. *Lowery's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 745 (D. Md. 2003).

101. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 12.04[A][2], at 12-77 (2006).

102. 344 F. Supp. 1350 (S.D.N.Y. 1972).

campus by a student organization which infringed on the rights of the copyright owner and licensee to distribute and exhibit the motion picture.¹⁰³ The Plaintiffs sought, inter alia, damages for the alleged infringement, asserting that the University was liable as a vicarious infringer because it controlled the premises where the film was shown and provided the room and projection equipment that allowed for the unlawful showing.¹⁰⁴ The court clarified that liability for vicarious infringement requires a demonstration that one has a “right and ability to supervise the infringing activities, as well as a direct financial interest in those activities.”¹⁰⁵ In its defense, the University argued that it could not control the student organization, and that the act of providing a room and projection equipment for the showing was merely a ministerial function.¹⁰⁶ Interestingly, the University argued that it does not inquire as to what use will be made of the room and equipment it assigns.¹⁰⁷ The court rejected the University’s contention that it did not have the right or ability to have supervised the infringing activity.¹⁰⁸ Specifically, the court noted that the University subsequently was able to prevent the student organization from showing the film.¹⁰⁹ However, because the Plaintiffs presented no evidence that the University received any financial benefit from showing the bootleg film, they could not prevail on the vicarious infringement claim against the University.¹¹⁰

The TEACH Act places colleges and universities in the position of implementing preventive measures to avoid unauthorized distribution and retention of digital transmissions; but if those efforts fail, it is likely that plaintiffs will be able to satisfy the first element of the vicarious infringement claim. The second element, which examines whether the alleged infringer had a direct financial interest in the unlawful activity, may provide colleges and universities with an avenue to separate itself from the acts of students, student organizations, and faculty who may engage in copyright infringement.¹¹¹ However, it is critical to recognize that while early cases may have strongly required that the benefit from the copyright infringement be obvious and direct, that standard has relaxed in recent years. In *A&M Records v. Napster*,¹¹² the Ninth Circuit agreed with a lower court finding that the Plaintiffs would likely succeed in establishing that Napster has a direct financial interest in the infringing activity. Relying on the district

103. *Id.* at 1352.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1352–53.

108. *Id.* at 1353.

109. *Id.*

110. *Id.*

111. It is important to remember that vicarious liability stems from the master-servant, employer-employee doctrines which suggest that the faculty, as employees, may be able to place a college or university at risk for vicarious copyright infringement due to their relationship with the institution. This is in contrast to students who have a relationship that is neither akin to that of an employer-employee, nor governed by the *in loco parentis* doctrine.

112. 239 F.3d 1004, 1023 (9th Cir. 2001).

court's reasoning, the Ninth Circuit indicated that "[f]inancial benefit exists where the availability of infringing material 'acts as a "draw" for customers.'"¹¹³ Therefore, it appears reasonable to conclude that the law has evolved such that the second element of the vicarious copyright infringement claim may be shown by evidence that a defendant had an obvious and direct financial interest or an indirect interest.

V. SOLUTIONS

If lack of clarity, uncertainty of costs, academic freedom, and potential liability are all legitimate concerns for academic institutions pondering whether to implement the TEACH Act, en masse institutional participation in, and support for, the TEACH Act will require formulation of strategies and solutions that will facilitate this process.

In discussing issues surrounding the proliferation of distance education in the academy and the related obligations and responsibilities attendant to the use of copyrighted materials, Ann Springer, counsel for the American Association of University Professors, laments the fact that "we all continue to attempt to put the round peg of academic work into the square hole of copyright law."¹¹⁴ Springer raises the question of whether attempts to work through the obvious problems with the TEACH Act are in fact futile.¹¹⁵ The already-identified frustrations with the requirements of the TEACH Act may cause some colleges and universities to ignore the Act, relying instead on fair use, licensing, permissions, and the public domain, unless the Act is seen as a viable—perhaps preferred—alternative. One possible remedy is a set of universally-applicable regulations, drafted to help all colleges and universities implement the Act.

A. Need For Regulations

The need for regulation is directly related to the lack of clarity and guidance contained within the Act. While we can glean some insight into what is required from those who have sought to apprise us of what is required by the Act,¹¹⁶ either separately or collectively, academic institutions which utilize the Internet and/or engage in the provision of distance education courses have to be able to understand the Act, i.e., define and clarify vague terms, identify and develop "technological measures" to avoid retention and further dissemination of copyrighted works outside the classroom, and educate and train faculty, staff, and students about transmission and receipt of copyrighted information over the Internet.

113. *Id.* See also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263–64 (9th Cir. 1996) (supporting the contention that financial benefit may be shown where infringing activity enhances the attractiveness of a venue).

114. SPRINGER, *supra* note 5.

115. *Id.*

116. CREWS, *supra* note 5.

Based upon commentaries, opinion, and all that has been written about the TEACH Act,¹¹⁷ it becomes abundantly clear that efforts at developing strategies to comply with the TEACH Act are underwhelming. There are certainly some institutions that have accepted the challenge to fashion policies and procedures and develop the “technological measures”¹¹⁸ required by the Act to protect the rights of copyright owners. But what about the rest of us? It is unlikely that the majority of us will ever find the time and resources to individually approach this issue and adequately address the utility of the TEACH Act in its current form. Nonetheless, the correct prescription might be a collectively developed set of policies and procedures, i.e., guidelines,¹¹⁹ that can be modified to allow for institutional idiosyncrasies. These guidelines would direct us in best practices for Internet use of copyrighted materials, for distance education as an additional teaching tool to face-to-face teaching, and for utilizing course management systems like Blackboard or WebCT.¹²⁰

Certainly, each institution can make its own concentrated effort to involve all faculty and staff participating in any form of distance education in the development of policies and procedures necessary to effectively implement the TEACH Act at that institution.¹²¹ However, rather than each institution having a committee, it may be preferable for representatives of a cross-section of institutions, and of course, copyright owners, to convene for the purpose of clarifying, defining, simplifying, and developing strategies, software, and guidelines for the implementation of the TEACH Act. Such an approach would have a greater impact on a larger segment of the academic community.

B. Model: The Classroom Guidelines¹²²

Many have criticized the specificity with which the Classroom Guidelines dictated how much and what was permissible use of copyright works in classroom teaching environments.¹²³ However, the comfort with the Guidelines was that they

117. See *supra* notes 5, 8, 30, 31, 34, 47 and 50 and accompanying text.

118. See, e.g., North Carolina State University’s TEACH Toolkit, *supra* note 5; MIT Office of Intellectual Property Counsel website, <http://web.mit.edu/ipcounsel/teach.html> (last visited Apr. 10, 2007). The University of Texas and Indiana University-Purdue University Indianapolis have similar policies.

119. Any suggestion that such guidelines might clarify the TEACH Act must be considered in the context of recent amendments to the regulatory process set forth in Executive Order 12866, which will impact guidance documents. Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1.

120. See Ashley, *supra* note 47. Cf. Hillel J. Hoffman, *SCT Prof. Wins Grant to Explore Copyright*, TEMPLE TIMES, Feb. 22, 2007 at 1, 5 (discussing a professor in Temple University School of Communications and Theater who has received a \$600,000 grant to “develop and distribute a ‘code of best practices’ that reflects the emerging consensus among educators concerning the application of fair use and copyright clearance to media literacy education”).

121. See AM. ASS’N OF UNIV. PROFESSORS, *supra* note 46.

122. U.S. COPYRIGHT OFFICE, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS (1995), <http://www.copyright.gov/circs/circ21.pdf>.

123. DANIEL LEE, FAIR USE AND GUIDELINES, <http://www.ala.org/ala/washoff/WOissues/copyrightb/copyrightarticle/whatfairuse.htm> (last

represented “minimum standards”¹²⁴ to guide the use of copyrighted materials in the classroom. Educators certainly had the discretion to do the extra work necessary to determine whether additional use was permitted; however, there was a “safe harbor”¹²⁵ which provided a clear benchmark for use of such material. While there were definitions¹²⁶ and limitations,¹²⁷ all non-profit academic institutions could consult the guidelines to know the least of what was permissible. If a professor or instructor adhered to the specifics of the Guidelines, he or she and his or her respective institution was less likely to be, and therefore less concerned about being, subject to any informal or formal allegations of infringement.

The development of guideposts for the TEACH Act obviously leads to questions regarding whether the Act’s requirement of “technological measures” is conducive to the type of specificity with which the Classroom Guidelines were developed. Arguably, the language is purposely vague and subject to a more general set of principles than specific technical standards in order to give institutions the flexibility to factor in costs and other concerns when identifying the technological measures that each will employ to comply with the Act’s prerequisites. Conversely, however, the absence of specificity in the language of the TEACH Act leaves institutions without any guidance and with the potential for better or worse resolutions that have neither congruence nor logic. Perhaps too much specificity or precision is not the answer—however, neither certainly is the absence of any guidance. A balance between setting specific technical standards and a more general set of principles may be preferable.

The TEACH Act seems well-suited to such guidelines. Moreover, work has already been done: several schools have developed their own guidelines and software,¹²⁸ which can serve as a starting point for developing a set of universally acceptable guidelines. Such “guidelines” would arguably make the TEACH Act a more useful tool to guide infringement-free education of students—in both distance education and in the traditional classroom as an assistive teaching tool.

visited Apr. 10, 2007).

[T]he Classroom Guidelines purport “to state the minimum and not the maximum standards of educational fair use under Section 107.” Put into practice, however, these limits become upper bounds on uses that are regarded as legitimate, as courts often look to common practice to set standards. In cases involving commercial copy centers that create course packs, the courts have interpreted these Guidelines as defining ceilings to support findings of infringement.

Id.

124. H.R. REP. NO. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681 (stating that “[t]he purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2233”).

125. Mary Levering, *What’s Right About Fair-Use Guidelines for the Academic Community?*, J. AM. SOC’Y FOR INFO. SCI., Dec. 1999, at 1313.

126. *E.g.*, “brevity,” “spontaneity,” and “cumulative effect.” See U.S. COPYRIGHT OFFICE, *supra* note 122, at 8.

127. *E.g.*, “[a] chapter from a book” or “(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.” *Id.*

128. See, *e.g.*, sources cited *supra* note 118.

Initially, a number of the Act's most important terms need better definitions and greater clarification. A major portion of the Act that is designed to protect the interests of copyright owners requires institutions in the case of digital transmissions to "appl[y] technological measures that reasonably prevent retention of the work in accessible form by recipients of the transmission"¹²⁹ A working definition of "technological measures"—not necessarily with a finite lid, but with examples sufficient to guide colleges and universities irrespective of size of either the student body or its endowments—would provide clarity and make costs more certain. As mentioned, NCSU has developed software designed to address the "technological measures" requirement of the Act.¹³⁰ A Classroom Guidelines group could adopt such software as a model and/or offer it as a reference by which other institutions are guided.

Similarly, definitions or language that provide a better understanding of terms such as "reasonably prevent" will be helpful. If "reasonably prevent" means a "good faith effort" the guidelines should so state and offer examples wherever possible. One of the more difficult tasks for any administrator, attorney, software specialist, or instructor, is to be able to identify exactly what needs to be done in order to comply with the Act. A list of such requirements—in clear and simple terms—would suffice.

To properly develop these guidelines, there undoubtedly has to be a concentrated effort to involve all faculty and staff participating in any form of Internet-related education in developing the policies and procedures necessary to effectively implement the important elements of the TEACH Act.¹³¹ According to the Act itself, the responsibility is a shared one¹³² under which faculty, staff, and the institution must collectively commit to taking the necessary steps to implement the applicable provisions. Therefore, representatives of each of these constituencies should participate in developing these proposed guidelines. While the interests of copyright owners must also be represented in any forum where guidelines are developed and crafted, the end result cannot be guidelines with an inequitable leaning in favor of copyright owners.¹³³ While copyright owners should certainly be at the table to help craft any guidelines associated with the TEACH Act, balance among all interested parties must be achieved.

The referenced NCSU Guidelines¹³⁴ provide an excellent example of the type of guidelines that a consortium might develop for universal use. Initially, the "TEACH Toolkit," as the website is labeled, identifies three broad areas that are important to accomplishing compliance with the Act: Education, Implementation,

129. 17 U.S.C. § 110(2)(D)(ii)(I)(aa) (2005).

130. North Carolina State already provides a license to the software to "accredited non-profit higher education institutions" to copy, distribute, and make derivative works of the source code for their software. North Carolina State University's TEACH Toolkit: Copyright Notice and License Terms for the "TEACH Act Downstream Control" Program, <http://www.lib.ncsu.edu/scc/legislative/teachkit/teachnotice.html> (last visited Apr. 10, 2007).

131. Cf. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 46.

132. 17 U.S.C. §110(2) (2006). See also CREWS, *supra* note 5; *supra* Part III.

133. See *supra* Part IV; *infra* Part VI.

134. North Carolina State University's TEACH Toolkit, *supra* note 5.

and Best Practices.¹³⁵ The Education components provide faculty, staff, and students with everything each needs to know—a mini copyright crash course, the basic requirements of the Act, a glossary of terms, the actual language of the Act, and legislative history—to understand the Act and its purpose.¹³⁶ The documents in the Implementation section are a “what to do” guide—there are checklists, copyright notice requirements and directions, a permissions guide (which is more specific to NCSU), and even a PowerPoint presentation on the Act that summarizes it all.¹³⁷ Finally, there is a section on Best Practices that covers authentication, downstream controls, and digitization of copyrighted works.¹³⁸ The Toolkit also includes a section on matters related to the TEACH Act, e.g., fair use and licensing at NCSU, and concludes with a “More Help” section, for difficult situations or when someone just does not “get it.”¹³⁹ These latter two sections have greater applicability to NCSU, and represent the way in which universal guidelines can be “tweaked” to meet the individual needs of colleges and universities, after providing guidance on education, implementation, and best practices.

The TEACH Act with a set of guidelines, much like those developed by NCSU, and other available mechanisms regarding the use of copyrighted material, including fair use, permissions, and licensing where necessary, should provide the greatest opportunity to take advantage of digital transmission. Collectively, these efforts have the potential to refocus the United States as a preeminently educated society, both traditionally and in the high-tech world which continues to evolve.

VI. CONCLUSION

The United States has historically been a world leader in educational attainment, but international comparative data suggests that the United States has fallen behind countries in Europe and Asia in this regard. Specifically, the United States is producing fewer college and university graduates (ages twenty-five through thirty-four) as a percentage of the population than Japan, Canada, Ireland, and Korea.¹⁴⁰ Given this troubling reality, it is increasingly important that U.S. educational institutions have the freedom to expand distance learning opportunities and take full advantage of digital technologies in the interest of educational advancement.

While the TEACH Act was intended to expand educational offerings for Americans throughout the country, the Act’s inherent complexity and safeguards, designed to protect the interests of copyright owners, has undermined its effectiveness and has resulted in a level of priority given to the interests of copyright owners that may in this instance be excessive. Are the safeguards

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION AT A GLANCE 2006 (2006).

provided to protect the interests of copyright owners reasonable, or do the safeguards unreasonably transfer the obligation for prevention of unauthorized retention and dissemination of digital copyrighted materials to colleges and universities? Absent any guidelines to direct institutional efforts to translate and understand those obligations, the unreasonableness of the Act's prescriptions is heightened.

Our nation's higher education system is a tremendous resource that must have the freedom to exploit the use of digital technology. Certainly, the interests of copyright owners pale in comparison. If colleges and universities are to make substantial contributions in the future, the TEACH Act and its safeguards require reconsideration.