COPYRIGHT LAW—LIBRARIANS WHO TEACH: EXPANDING THE DISTANCE EDUCATION RIGHTS OF LIBRARIES BY APPLYING THE TECHNOLOGY EDUCATION AND COPYRIGHT HARMONIZATION ACT OF 2002

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Introduction

Scott, a reference librarian at an academic library, opens his e-mail and finds a request from a faculty member. Professor Smiler has asked that a copyrighted report and clips of a video owned by the library be scanned and made available electronically to the students in his on-campus Adolescent Development class. Scott knows he has the technical capacity to comply with the request, but he is concerned: Is such a use permitted under copyright law? Does he, as a librarian, have sufficient privileges with respect to the copyrighted material to comply with Professor Smiler's request?

Another librarian, Ken, has coffee with Professor Smiler. In passing, Professor Smiler mentions that his Gender Development class will be discussing images of men from popular media. Ken knows the library owns many contemporary magazines and wonders if he could find images that would be useful to Professor Smiler and his class. Not wanting Professor Smiler to get his hopes up, Ken does not mention the magazines. Later, Ken sorts through back issues, marking images he intends to offer to Professor Smiler. Ken wonders if he may digitize these images and post them online for Professor Smiler and his class.

Across campus, Emily, an instructional technology designer, opens an e-mail from Professor Smiler. This time, Professor Smiler requests that some textual and audiovisual material be added to the course space he uses for his distance education Child Development section. Emily also evaluates the request, and comes to the same conclusion as Scott: she is capable of posting the material, but she is not sure whether she may.

Despite the similarity of their positions, Emily, Ken, and Scott may have different privileges with regard to providing access to copyrighted materials—even though they are staff members at the

1. “Course space” refers to the electronic delivery mechanism of distance education, whether this is a simple web page or a more complex technological setup.
same nonprofit institution of higher education, even though they are assisting the same faculty member, and even though they may ultimately be serving some of the same students. This Note will examine some of the ways in which their privileges may differ, how these privileges should be interpreted, and argue that these privileges should be similarly broad.

Legislatures have long enacted copyright laws in response to technological changes. The 1976 Copyright Revision Act, a general revision of the nation's copyright laws and the basis of modern copyright law in the U.S., was in part a response to such changes. As copyright principles are applied to new technologies, unforeseen aspects of the technology can create unintended consequences; problems of this sort have been apparent in distance education. Congress updated the copyright laws in 2002 to specifically address ambiguities and concerns created by new technology.

Distance education has been a growing industry since well before the age of the Internet. While the first incarnation of distance education consisted of correspondence courses, later incarnations have incorporated technology such as broadcast television, cable television, video recordings, and more recently the Internet. The modern form of distance education, sometimes referred to as online education, typically consists of asynchronous instructional modules created by the professor and conducted by the student at his leisure. It can also include scheduled, real-time interactive sessions between groups of students and the professors and communication among the students to discuss the subject matter and complete assigned projects. Courses of this type are offered by a

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3. Sony, 464 U.S. at 430 n.11.


5. Id.


variety of institutions, ranging from independent subject-oriented organizations, to for-profit educational institutions, to accredited nonprofit colleges and universities. Many traditional universities have begun offering distance education courses and have added distance education elements to traditional courses offered in person.

Students who attend traditional classes on the campus of an accredited college or university have access to that institution's libraries and the variety of services that these libraries provide. Distance education students, on the other hand, may not have access to the institution's libraries in person. Over the years, libraries have developed services specifically designed to accommodate the needs of distance education students. At present, many libraries provide some services over the Internet, much as professors provide instructional materials over the Internet.

Some of the practices in distance education during the 1990s conflicted with copyright law until the passage of the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH). TEACH updated copyright law to ensure that distance educators would be permitted to take advantage of Internet technology in developing online curricula, while protecting the interests of copyright owners. However, TEACH did not specifically include libraries in its provisions, so the degree to which libraries may take advantage of this new act remains unclear.

In an effort to explore the possible advantages libraries may have under TEACH, Part I of this Note will review the development of copyright law and examine the classroom exemption built into the 1976 Copyright Revision Act. It will then examine the ways in which copyright laws were inadequate to deal with the recent developments in distance education technology and practices and discuss the legislative remedy. Part II will review the fair use

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10. U.S. Copyright Off., supra note 7, at 16-17; see Meredith Ault, Thinking Outside the Library: How to Develop, Implement and Promote Library Services for Distance Learners, in Distance Learning Library Services: The Tenth Off-Campus Library Services Conference 39, 43-46 (Patrick B. Mahoney ed., 2002) (describing trends in library services to distance learners); Anne Marie Casey et al., Fair is Fair, or Is It? Library Services to Distance Learners, in Distance Learning Library Services: The Tenth Off-Campus Library Services Conference, supra, at 147, 148-60 (describing services to distance learners at three academic libraries).
doctrine and its role in permitting uses of copyrighted materials by non-owners. A fair use determination may buttress a library’s conclusion that a particular activity would be copyright-permissible under an expanded reading of TEACH. Libraries may place greater confidence in a decision to act if it is arguably supported both by an expanded TEACH analysis and also their fair use analysis. Part II will conclude with a description of the Classroom Guidelines and other non-legislative guidelines developed cooperatively to guide educators in their application of the copyright laws. Part III will argue for the inclusion of some library activities into coverage by TEACH, based on public policy, fair use, and consistency in copyright law.

I. Classroom Use of Copyrighted Material

Copyright is fundamentally a way of encouraging the creation of new and creative works within society. To that end, original expressions of ideas are registrable as copyrighted materials. Copyright owners have the exclusive rights to reproduce the copyrighted work . . . to prepare derivative works . . . to distribute copies . . . by sale or other transfer of ownership, or by rental, lease, or lending; . . . to perform the copyrighted work publicly . . . to display the copyrighted work publicly; and . . . to perform the copyrighted work publicly by means of a digital audio transmission.

Specific legislative provisions also permit certain people—among them classroom teachers—to make some additional uses that are exempt from liability for copyright infringement. Additionally, non-owners are permitted to make “fair use” of copy-

12. “Owners” refers to those who own copyright in a particular work, whether they are the creator discussed in the constitutional provision or an assignee. “Non-owners” refers to anyone who does not own copyright with respect to a particular work. Non-owners may or may not have any rights to a work acquired by license or other means.


16. 17 U.S.C. § 110 (2000); see discussion infra Part I.B. Section 108 provides a “library exemption” which does not address the sorts of library services discussed here, such as the making of archival copies of library materials. 17 U.S.C. § 108 (2000).
righted material. The exemption for classroom uses and the fair use doctrine are alternative ways a non-owner may justify use of copyrighted material. Thus, a particular use may be justified as a fair use in a classroom setting even if the use does not fall into the classroom exemption.

This Part will review the general purposes of copyright in the United States. It will then discuss the permissible uses that non-owners may make of copyrighted materials under the classroom exemption included in the 1976 Copyright Revision Act. This Part then explores the purposes and passage of the TEACH Act. Finally, this Part identifies and clarifies how the provisions of TEACH are ambiguous with respect to libraries.

A. Purposes of Copyright Law

According to the Constitution, the goal of copyright is to "promote the Progress of Science and useful Arts." The Framers of the Constitution chose to achieve this goal by "securing . . . to Authors . . . the exclusive right" to his or her work, but only for a limited time. This provides an economic incentive for authors to create new work, by protecting their ability to earn a living from their labors. There are several ways in which the "exclusive right" of the author—the initial copyright owner—is limited under copyright law, and in which the rights of other individuals—non-owners—to use the works are permitted, including the classroom exemption and fair use.

"Progress [in] Science and useful Arts" requires the use of prior scholarship by later authors. The time limitation operates to allow use of a work once the author has gained some economic benefit from his creation, but while the subsequent use is still beneficial to society at large. Both the time limitation in the Copyright Clause, and the justification of "promot[ion of] the Progress of Sci-

17. 17 U.S.C. § 107 (2000); see discussion infra Part II.
18. Hutchinson, supra note 4, at 2217.
20. Id.
21. See 17 U.S.C. § 106 (providing the copyrights reserved to the creator of a work, as limited by the restrictions in §§ 107-118).
22. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (describing the fundamental tension of copyright as that "between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").
ence and useful Arts,” imply that copyright protection was never intended to be all-encompassing.23

B. The Pre-TEACH Classroom Exemption

One major way in which uses by non-owners were justified under the 1976 Act was through the classroom exemption. Classrooms were established as places of special privilege in relation to copyrighted materials. Narrow exemptions were provided for them, based on a policy of encouraging the socially valuable uses of these materials.24 The classroom exemption, located in § 110, allows copying and display of materials for in-class use.25 Specifically, subsection (1) permits performance or display of any work during “face-to-face” teaching activities, in a “nonprofit educational institution,” and “in a classroom or similar place.”26 The “face-to-face” restrictions clearly limit the applicability of this subsection to in-person educational interactions, eliminating any application of this section to distance learning environments.27 Subsection (2), applicable to distance learning, permitted the broadcasting of certain works during the “systematic instructional activities” that were “directly related . . . to the teaching content.”28 Further limiting this allowance was the requirement that the transmission be received “in classrooms or similar places” or by people of whom classroom attendance was considered unreasonable to require.29

During the passage of the Digital Millennium Copyright Act,30 Congress requested a report from the Register of Copyrights regarding the challenges posed by copyright law to distance education practices.31 This report, delivered to Congress in 1999, analyzed the current nature of distance education, its status and practice in the United States, the technologies used, and the impact of copyright

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25. 17 U.S.C. § 110(1)-(2) (2000). These exemptions have since been modified by the Technology Education and Copyright Harmonization Act of 2002, see infra note 33.
26. § 110(1).
28. § 110(2).
29. § 110(2)(C). Such people include those with disabilities or other “special circumstances,” and governmental officers and employees receiving the transmission “as part of their official duties or employment.” Id.
31. Digital Millennium Copyright Act, § 403.
C. Congress Confronts the Growing Necessity of Expanded Copyright Provisions for Distance Education

TEACH was intended to alleviate some of the frustration felt by distance educators. By 1999, it was clear that the classroom exemptions were not supporting distance education as sufficiently as they had in 1976. The failure of the statutory language to accommodate the needs of distance educators did not stem from a lack of Congressional will to benefit distance education, but from the development of new technology. In fact, the second classroom exemption included in the 1976 Act, located in § 110(2), "cover[ed] the forms of distance education existing when the statute was created." The methods primarily used at the time were "open or closed-circuit television and radio broadcasts," as opposed to today's delivery via the Internet.

The Copyright Office report noted several problems that had been created by the ways in which technology described in the 1976 statutory language varied from new technologies used in distance education. The 1976 Conference Committee had declared that "[t]here appears to be no need for a statutory definition of 'face-to-face' teaching activities," noting that these were any displays that were not "transmitted." While that may have been enough clarification under the extant technology in 1976, it did not remain clear to distance educators. The introduction of synchronous interactive and video technology blurred the line between in-person and distance education, and "face-to-face" became an ambiguous term.

32. U.S. COPYRIGHT OFF., supra note 7.
34. U.S. COPYRIGHT OFF., supra note 7, at vii (emphasis added).
35. Id. at 77.
36. The Copyright Office report also deals with several problems not addressed by this Note, including the types of materials permitted for display. Id. at 78-79.
38. For the first time, technology allowed a teacher and student to see and hear each other, and interact live, without being in the same physical location. The term that had been used to define in-person education no longer did so exclusively.
Additionally, concern arose regarding the technical side-effects of digital transmission: as a system transmitted the materials, it created a copy, albeit a temporary one, as part of the process.\(^{39}\) Neither § 110(1) nor (2) authorized the making of copies for use in an educational broadcast merely for performance and display.\(^{40}\) Although these temporary copies were not retained on either end of the broadcast, their mere existence implicated the copyright owner's exclusive right of reproduction. The technologically neutral wording of the statute was not sufficient to indicate that digital transmissions were to be permitted.\(^{41}\)

Finally, the shift from a location-based distance learning system to a networked, location-independent scheme created problems under § 110(2). Previously, broadcasts may have been directed to a classroom or to people in special circumstances;\(^{42}\) under the modern technological model the ability to “attend” from a home or office is a primary draw for distance education students.\(^{43}\) While the “special circumstances” provision of § 110(2) would certainly apply to some distance learners, it would likely not apply to those who choose distance education for reasons of convenience.\(^{44}\) This distinction would create two classes of distance learners for whom different displays would be permitted and would necessarily complicate the legal status of an educator's actions.

D. Overview of TEACH Provisions

TEACH expands into the electronic world the rights of educators to use copyrighted materials for distance education purposes.\(^{45}\) Organizations must meet strict requirements with regard to who is eligible to take advantage of the provisions, what materials may be used, the way in which the materials are used, and the technological safeguards that are erected. These requirements protect the rights

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40. Id. at 78. The right to reproduction is granted to the copyright owner under § 106(1); the rights to performance and display are granted in §§ 106(4), (5), and (6).
41. U.S. COPYRIGHT OFF., supra note 7, at 83.
42. This use would have satisfied the requirements of the 1976 statute. See supra text accompanying notes 25-29.
43. See, e.g., University of Phoenix, University of Phoenix Online, http://online.phoenix.edu (last visited Jan. 7, 2007) (listing as a benefit the ability to “[a]ttend class online when and where you want” and touting this as the “most convenient and efficient way possible” to earn a college degree).
44. U.S. COPYRIGHT OFF., supra note 7, at 84.
of copyright owners by narrowing the field of uses permitted under TEACH.

TEACH replaced the outdated classroom exemption, § 110, with a more technologically inclusive exemption. Under this new exemption, copyrighted materials may be displayed only by “government[al] bod[ies] or . . . accredited nonprofit educational institution[s].”46 This provision is an attempt to restrict the organizations that may use the privilege to bona fide educational organizations.47

Materials must be used “at the direction of, or under the actual supervision of an instructor,” and “as an integral part of a class session offered as a regular part of the systematic mediated instructional activities.”48 “Mediated instructional activities” are defined as “activities that use [copyrighted materials] 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.”49 Notably, this eliminated the requirement of a classroom setting for the recep-

47. This is an imperfect limitation; some legitimate educational organizations are eliminated by this definition. See S. Rep. No. 107-31, at 9 (2001), microformed on CIS No. 01-S523-1 (Cong. Info. Serv.). While there may be many worthy organizations that are either not accredited or are for-profit, the authors of TEACH drew the line there to restrict the potential negative effects of TEACH. This includes in TEACH most major mainstream outlets of higher education, while excluding for-profit “diploma mills” and other suspect organizations. See generally Bogus Degrees and Unmet Expectations: Are Taxpayer Dollars Subsidizing Diploma Mills?: Hearings Before the Comm. on Governmental Affairs, 108th Cong. (2004), available at http://a257.g.akamaitech.net/7/257/2422/07sep20041200/www.access.gpo.gov/congress/senate/pdf/108thrg/94487.pdf. Also excluded, however, are legitimate for-profit, accredited entities. See, e.g., Concord Law School, Executive Juris DoctorSM Program Disclosure Statement 1 (Jan. 2007), http://kucampus.kaplan.edu/DocumentStore/kuDocs/concord/clsl_ejddis_2.pdf (noting the school’s status as a division of Kaplan, Inc. and noting accreditation by the Accrediting Commission of the Distance Education and Training Council). Similarly excluded are many nonprofit organizations, such as professional associations, which may offer training and educational courses to its members, but are not accredited as an educational organization. Federally recognized accrediting bodies accredit some professional associations, such as the National Court Reporters Association. Nat’l Court Reporters Ass’n, Continuing Education, http://n克拉online.org/EducCertification/ContinuingEd (last visited Jan. 7, 2007) (noting the accreditation of the NCRA Continuing Education programs by the Accrediting Council for Continuing Education and Training). Numerous other professional organizations, such as the American Association of Law Libraries, provide continuing education for their members, without any mention of accreditation. See Am. Ass’n of Law Libraries, Professional Development Policy and Structure (1996), available at http://www.aallnet.org/about/policy_pro_dev.asp.
tion of educational transmissions. Congress intended, as much as possible, to give distance educators the same privileges enjoyed by traditional educators, without expanding those rights. Additionally, the display of copyrighted material must be “directly related and of material assistance to the teaching content of the transmission.” Congress explicitly stated its intention not to expand the covered activities to include research conducted outside of class. It did, however, allow more types of materials to be broadcast in distance education settings. TEACH also established that temporary network copies of works created during transmission are not considered infringements under the copyright law.

TEACH imposed technological criteria as well as substantive ones. The materials used must be protected by security systems, which are required “to the extent technologically feasible” to limit the receipt of the materials to legitimate users (i.e., enrolled students). Again, this addresses the concerns of use by outside users through hacking or compromised technological systems. In addition, the organization must employ technological safeguards that “reasonably prevent” users from retaining or re-transmitting the copyrighted materials. The transmissions allowed under the new provisions of § 110(2) must “appl[y] technological measures that . . . prevent retention . . . for longer than the class session; and unauthorized further dissemination” of the materials used. This ensures that the materials are used for their intended educational purposes, but no more. This specific attempt to protect the materials used through digital media follows a trend in copyright legislation, and is similar in intent to the Digital Millennium Copyright Act. Any

52. See S. REP. No. 107-31, at 9-10.
uses that fall outside these bounds would, of course, be permissible if there were some additional copyright privilege or license.

E. Ambiguity of TEACH Provisions as Applied to Library Services

The language of TEACH does not explicitly include libraries; however, the inclusion of acts taken “at the direction of . . . the instructor” leaves open the possibility that libraries would be protected from liability for some acts that might otherwise be considered infringements. Very little guidance is provided in the legislative history regarding what this “direction” refers to. The only example is that of a display being “initiated by a person enrolled in the class as long as it is done either at the direction, or under the actual supervision, of the instructor.” Exactly what this means is unclear. This specifically does not require “constant, real-time supervision by the instructor,” which may allow actions taken by librarians. The extent of the “direction” given by the instructor with respect to the actions of librarians is a key issue in determining whether the act should be permitted under an expanded reading of TEACH.

To be considered an appropriate use under an expanded reading of TEACH, the use must be a “regular part” of a “mediated instructional activity.” The realm of possible actions can be visualized as a spectrum, from uses that are an integral part of, or closely connected to, the qualifying activity to uses that are only distantly related to, or sparsely connected to, the qualifying activity. An example of a clearly connected use is one in which library staff only provides administrative support at the request of an educator (perhaps merely acquiring identified material, or providing technological assistance in making it available to users) and where the material is then used in a classroom presentation. At the other extreme, an example of a connection too attenuated to support the conclusion that it is TEACH-appropriate would be when a librarian independently identifies, acquires, and makes available supplementary materials that are not then incorporated into classroom presentations. Activities between these two extremes could include varying degrees of independent action and selection by librarians,

58. § 110(2)(A).
60. Id.
61. § 110(2)(A).
but with the material being reviewed, evaluated, and used by the instructor.

Some library activities are specifically mentioned as not being analogous to the activities to which TEACH is addressed. The House Committee Report mentions "student use of supplemental or research materials . . . such as . . . e-reserves, and digital library resources" as being beyond the scope of TEACH. A more sophisticated analysis of the types of services libraries provide indicates that these services go far beyond provision of "supplemental [and] research materials" and that characterizing the extent of library activities as "e-reserves[ ] and digital library resources" may paint library activities with too broad a brush. Many library activities or services provided today are used within a classroom or distance education context, and are more fundamental to the classroom presentation than those apparently anticipated by Congress. Displays provided by libraries that are used for classroom presentations (or the distance equivalent), rather than for ancillary study, should be considered appropriate for this protection.

TEACH expressly attempted to balance the increased rights of use and display under educational circumstances with protections for the rights of copyright owners. Both the distance education and library communities are trying to measure its impact and adjust to its requirements and allowances. The sense of the library literature is that the application of TEACH to libraries is uncertain, and the best course of action is to develop a policy based on a good-faith attempt to understand the scope of copyright law and abide by the policy in their use of copyrighted works. Libraries long accus-
tomed to analyzing copyright issues through the lens of fair use struggle to apply the new strictures.

II. FAIR USE

This Part will review the permissible uses that non-owners may make of copyrighted materials under the fair use doctrine. After an examination of the fair use analysis, it will discuss the creation of non-legislative guidelines, i.e., the agreements between the educational community and the publishing community regarding what uses were agreed upon as "fair" in the educational arena. It will conclude with an examination of cases related to these guidelines.

A. History of Fair Use

Some of the permissible uses reserved to non-owners come under the fair use rubric, a judicial doctrine tempering the rights of copyright owners to the benefit of society. Fair use was established in American case law in the mid-nineteenth century in Folsom v. Marsh. Folsom involved the republication of several letters by George Washington, previously published only in a twelve-volume set by the plaintiffs. The defendants excerpted the “most instructive, useful and interesting” letters in a two-volume set. Folsom discussed whether the defendants’ use of the plaintiffs’ material was an infringement on their copyright, or justified by public policy.

The 1976 Act codified the long-standing factors involved in a modern fair-use analysis, at 17 U.S.C. § 107:

[F]air use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

67. See Sharp, supra note 57, at 5 (noting the importance of the “dissemination of information”).
69. Id. at 345.
70. Id. at 348.
71. Id. The description of the fair use in Folsom involves “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Id. (emphasis added). The court noted that “[m]any mixed ingredients enter into the discussion of such questions.” Id.
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.72

B. Fair Use Analysis

The 1976 enactment of § 107 was intended neither to change nor “freeze” the judicially created doctrine of fair use, but only to give a “very broad statutory explanation” and provide “some of the criteria applicable to it.”73 The Senate Report specifically mentioned that the courts must have the ability to flexibly apply the doctrine in each instance.74 It also mentioned that the list was not exclusive; other factors may be applied as the court deems necessary in an individual circumstance. Courts routinely recite the factual nature of the fair use determination.75

Naturally, any determination that relies heavily on a flexible application of the doctrine to the facts in each particular case will not provide the certainty of a bright-line ruling. Practitioners attempting to make this determination, however, are supported by hundreds of years of cases applying the doctrine.76 Librarians attempting fair use determinations also rely on a plethora of tools such as checklists that assist non-lawyers in approximating a fair use determination.77

74. Id.
1. Fair Use Factors

The first factor in a modern fair use determination is the "purpose and character of the use." The statutory language and reports surrounding the passage of the 1976 copyright revision indicate that another concern addressed by this factor is whether the use is made for a profit, which is disfavored. While modern cases emphasize skepticism of commercial uses, there is no presumption that a commercial use is not fair. One of the concerns with a commercial use is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price," i.e., a licensing fee. Educational uses are favored, but an educational use does not create a presumption of fair use. Finally, "transformative use[s]," those uses that produce new substantive works, are often favored over others.

The second statutory factor, the "nature of the copyrighted work," distinguishes between "informational" and "entertainment" works. The guiding principle animating this factor is that works that are born "more of diligence" deserve less protection than works "of originality or inventiveness." A defense of fair use is more difficult to maintain when the copyrighted work used is one of originality; informational works generally receive less deference.

79. H.R. Rep. No. 94-1476, at 66 (disclaiming an automatic exemption for non-profit uses, but indicating that the character of the use may weigh for or against fair use).
83. See Campbell, 510 U.S. at 579.
84. 17 U.S.C. § 107 (2000); see Patry, supra note 78, at 504-07. Some commentators claim this factor is actually discounted or dealt with in a perfunctory manner when analyzed. See William F. Patry & Richard A. Posner, Fair Use and Statutory Reform in the Wake of Eldred, 92 Calif. L. Rev. 1639, 1644 (2004); see also Sony, 464 U.S. at 496 (Blackmun, J., dissenting) (noting that the Court failed to consider the second factor in finding a fair use).
and protection than do entertainment works, and are favored as subjects of fair use.\textsuperscript{86} Additionally, works of fact are more important to disseminate to society at large, and thus less deserving of protection under the law of fair use, than a work of fiction.\textsuperscript{87}

The third statutory factor, “amount and substantiality,” involves a consideration of the whole of the copyrighted work and the citing work.\textsuperscript{88} The permitted “amount” does not depend on a mathematical formula of the percentage or number of words used.\textsuperscript{89} It can, in fact, refer to taking only the part of the copyrighted work that is of the “most interest and value.”\textsuperscript{90} Thus, a brief passage copied from a lengthy original may fail to qualify as a fair use under this factor, if the portion used represents the best nugget of the original work.\textsuperscript{91} It is, however, important to consider the purpose and character of the use when evaluating the amount of copying that is appropriate under this factor; some uses necessarily require more copying to achieve the intended effect.\textsuperscript{92}

The fourth and final factor listed in the statute, the “effect of the use on the potential market,” has been described as the most important of the four factors.\textsuperscript{93} Once a prima facie case of market harm is established, the burden shifts to the defendants to prove that the harm would have occurred even without their use of the work.\textsuperscript{94} Many of the early fair use determinations involved abridgements of voluminous works into more accessible, and often less expensive, forms.\textsuperscript{95} Many of these abridgments were held to

\begin{itemize}
\item \textsuperscript{86} See Campbell, 510 U.S. at 586; Harper & Row, 471 U.S. at 563; Sony, 464 U.S. at 496.
\item \textsuperscript{87} Harper & Row, 471 U.S. at 563. On this point, the dissent in Harper & Row agrees with the majority. Id. at 594 (Brennan, J., dissenting).
\item \textsuperscript{88} 17 U.S.C. § 107 (2000).
\item \textsuperscript{89} Patry, supra note 78, at 21-22. But see infra Part II.B.3 (discussing the Classroom Guidelines’ mathematical calculations).
\item \textsuperscript{90} Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901) (finding that the defendant’s work selected the best parts of the plaintiff’s original).
\item \textsuperscript{91} See Harper & Row, 471 U.S. at 565 (referring to the district court’s determination that the used passages represented “the heart of the book”).
\item \textsuperscript{92} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-89 (1994) (discussing the amount of copying necessary for a parody to evoke the original in the minds of those who hear or see it).
\item \textsuperscript{93} 17 U.S.C. § 107.
\item \textsuperscript{94} Harper & Row, 471 U.S. at 566; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 476 (1984).
\item \textsuperscript{95} Harper & Row, 471 U.S. at 567.
\item \textsuperscript{96} See, e.g., Patry, supra note 78, at 12 (discussing Roworth v. Wilkes, 170 Eng. Rep. 889 (K.B. 1807)).
\end{itemize}
have had a negative impact on the sale of the original. The potential for future harm is as important as any prior harm. The potential of a published work to generate income through licensing fees is considered relevant under this final factor. Even the effect of a work on the market for derivative works is to be considered. In sum, any financial loss attributable to a non-owner's use of the copyrighted work is relevant to the inquiry. Conversely, a lack of showing of economic harm does not in itself create a fair use.

While the Senate Report did not provide a general discussion of the application of fair use, it specifically mentioned the fair use implications of classroom copying, citing the lack of judicial guidance in these areas. Noting that nothing in § 107 or § 110 excludes materials used in the classroom from a possible fair use determination, the report identifies factors that would lead to a determination of fair use in the classroom.

2. Modern Fair Use Cases

In the early 1980s, several owners of copyrights in television programs sued the makers of video tape recorders (VTRs) for contributing to the infringement they were allegedly enabling by making their technology available to the public. The owners claimed that users of the VTR technology were repeatedly and illegally copying material from television, violating their copyrights. The Supreme Court found that a significant use of the technology was to

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97. See id.
101. PATRY, supra note 78, at 25.
102. S. REP. NO. 94-473, at 61-62 (1975), microformed on CIS No. 75-S523-22 (Cong. Info. Serv.). In fact, the report deals very little with non-educational fair use examples, although it specifically disclaims that only the uses discussed in the report may be fair ones. Id. at 63.
103. Id.
105. Id. at 419-20.
"time-shift" television programs, by allowing users to record a televised program and watch it at a time of their choosing. By time-shifting, the audience for the programs was actually increased. The Court concluded that time-shifting was a fair use within the meaning of 17 U.S.C. § 107, focusing its inquiry on factors one (the purpose and character of the work) and four (the potential harm to the market of the original).

Justice Blackmun's dissent, however, alleged that the Court did not properly perform the fair use analysis. He noted that nowhere in the statute is it indicated or even implied that the making of single copies for personal use can be considered fair use under the statute. Additionally, the Court failed to consider the effect of the second and third fair use factors (the nature of the use and the amount of the original used); including them in his analysis led Justice Blackmun to conclude that the use was not fair.

The Supreme Court addressed fair use again the following year, in Harper & Row, Publishers, Inc. v. Nation Enterprises. The political magazine The Nation published an article that excerpted a forthcoming memoir by former President Gerald Ford. Ford's publisher, Harper & Row, was under a prior contract with Time Magazine for the right to serialize the memoir. Citing the article's appearance in The Nation, Time withdrew from the contract. Harper & Row sued for copyright infringement, claiming that the excerpts used in The Nation article constituted the "heart" of the manuscript and that the cancellation of the serializing contract was proof of market harm. The Court accepted these arguments and emphasized that the commercial nature of The Nation article was a key factor in determining that there was no fair use.
The majority explicitly considered all four statutory factors, unlike the majority decision in *Sony*.

A final landmark case considering the fair use of copyrighted material arose from a rap group’s use of a rock song as the basis for a parody of the original. The band 2 Live Crew recorded a song using the first words and a musical theme of Roy Orbison’s and William Dees’s “Oh, Pretty Woman,” to create the new “Pretty Woman.” The similarity in the song titles is not reflected in their tones or lyrics, and two courts held that the 2 Live Crew version constituted social commentary and a parody of the original. The Supreme Court held that the appellate court had incorrectly determined that the parody’s commercial nature created a presumption that the work was not a fair use and that commercial parodies could, indeed, be fair uses. The undivided Court examined the peculiar nature of a parody, including the near certainty that a parody will be of a well-known work and the likelihood that it will be commercial in nature. The Court was careful to note that a decline in the market for a work due to criticism of it does not constitute market harm under the fourth factor of the fair use statute.

3. Non-Legislative Guidelines

The practical development of educational fair use has come about outside of the courtroom as a dance between non-owners (librarians and educators) and owners (publishers). During passage of the 1976 Act, Congress recommended the development of an understanding between these stakeholders regarding “permissi-

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118. *Id.* at 560-68. *Contra* Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 448-51 (1984) (considering only the first and fourth factors).


120. *Id.* at 572.

121. *See id.* at 581-83.

122. *Id.* at 583-84.

123. *Id.* at 586-91.

124. *Id.* at 591-92.

ble educational uses of copyrighted material." As a result, the Classroom Guidelines were born.

The Classroom Guidelines were the result of private negotiations between the library and educational communities and publishers. According to the text, they were never intended to describe the full permissions granted to educators and librarians under fair use, but were instead a statement of some permissible uses. The library and educational communities desired that further uses be perceived as possible fair uses, but the nature of the agreement was that it represented the furthest extent upon which the parties could agree: all fair uses agreed upon by the negotiating parties were reflected, and anything beyond the agreement would be unacceptable as a fair use to one party or the other. As a result, rather than serving as a springboard for further fair use analyses, the Classroom Guidelines effectively defined the full extent of educational fair use available without litigation.

The Classroom Guidelines provide a more mathematical and rigid scheme than the four-factor fair use test for determining whether a use of copyrighted material is justified. The deceptive attraction of the Classroom Guidelines is their alleged simplicity of application, in contrast to the uncertainty in application of a fair use determination under 17 U.S.C. § 107. The criteria included in this determination—brevity, spontaneity, and cumulative effect—were defined in terms of raw amounts of material, regardless of import, in relation to the whole of the copyrighted work. In addition, the

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127. See Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions (Classroom Guidelines), included in H.R. REP. No. 94-1476, at 68-70.
129. Classroom Guidelines, Preamble, H.R. REP. No. 94-1476, at 68.
130. See Crews, supra note 125, at 669-70 (indicating a willingness by the publishers' groups to sue for any uses that fall outside the scope of established guidelines). The difference in position between educators and publishers only increased the natural disparity between their respective power: as the copyright owners, the publishers would always be the plaintiff in a copyright infringement suit. Id. at 678. As such, they would have complete control over whether a suit were threatened or actually filed. Librarians and educators, on the other hand, as the users of the copyrighted materials, would always be subject to the litigation decisions of the publishing community. In addition, the publishing community generally maintains a greater financial ability to mount a legal attack than the librarians and educators do to defend against one. Id. at 679.
131. Id. at 669-70.
132. H.R. REP. No. 94-1476, at 68-69. For example, the Classroom Guidelines permitted the copying of a single chapter, article, or short story for the use of the
Guidelines include four bright-line prohibitions that remove a use from the realm of fair use. There is no balancing of interests or weighing of factors.

The first infringement suits for educational fair use to consider the Classroom Guidelines occurred in the early 1980s, not long after the implementation of the 1976 Act. A group of copyright owners, represented by the American Association of Publishers, sought to restrict certain copying practices at colleges and universities. To prevent future infringing actions by professors, the publishers filed suit directly against New York University and several faculty members. As a condition of the suit's settlement, New York University and the professors agreed to abide by the Classroom Guidelines. The settlement indicated that the publishers viewed the Classroom Guidelines as a definitive statement of the furthest bounds of fair use, rather than as a safe harbor and statement of the minimum permissible activities constituting fair use.

The effects of the New York University suit and settlement were far-reaching. While the original actions addressed by these early copy shop cases may have been egregious violations of copyright law, the settlements and protective policies restricted future activities further than was perhaps warranted by the fair use doctrine. Despite their lack of official status, the Classroom Guidelines were treated as governing the educational and library uses of copyrighted materials by educators and librarians as well as publishers.

teacher in preparation or teaching of a class, and multiple copies subject to restraints of brevity and spontaneity. Id. at 68. Brevity required that, for works of prose, the entire piece may only be used if it was less than 2,500 words; an excerpt was considered "not more than 1,000 words or 10% of the work, whichever is less," but allowed at least 500 words, even for short pieces. Id. Similar mathematical restrictions exist for other types of original works. Id. at 68-69.

133. Id. at 69-70. The Classroom Guidelines prohibited the following absolutely: using copied works "to create or to replace or substitute for anthologies, compilations or collective works"; "copying . . . from works intended to be 'consumable' in the course of study or teaching"; copying as a "substitute for the purchase of books," copying at the direction of an authority higher than a classroom teacher, or copying in which the same item is copied term after term; charging students "beyond the actual cost of the photocopying." Id.


135. Crews, supra note 125, at 640 (citing Addison-Wesley Publ'g Co. v. N.Y. Univ., No. 82-8333 (S.D.N.Y., filed Dec. 14, 1982)).

136. Id. (citing Addison-Wesley Publ'g Co. v. N.Y. Univ., No. 82-8333 (S.D.N.Y., filed Dec. 14, 1982)).

137. Id. at 641.
As a result, the publishers succeeded in limiting the user of copyrighted materials to the publishers’ views of what a fair use should be through superior nerve and litigious power.\textsuperscript{138}

4. Copy Shop Cases

Courts have only addressed the Classroom Guidelines in cases involving commercial uses by for-profit copy shops.\textsuperscript{139} The most prominent of the copy shop cases are \textit{Basic Books, Inc. v. Kinko’s Graphics Corp.}\textsuperscript{140} and \textit{Princeton University Press v. Michigan Document Services, Inc.}\textsuperscript{141} In both cases, the commercial uses weighed against a finding of fair use, despite their connection with educational uses.

In \textit{Basic Books}, a corporate copy shop was sued for infringement as a result of services marketed towards college professors.\textsuperscript{142} After finding that the uses involved were not fair, the court discussed the Classroom Guidelines, and concluded that the uses the defendant made of the copyrighted material also fell far outside the intended boundaries of the Classroom Guidelines.\textsuperscript{143} The applicable provision of the Classroom Guidelines was one of the bright-line prohibitions, which automatically excluded an anthology from qualifying as a fair use. Notably, the court accepted the defendant’s position to “seek a less rigid view” of the Guidelines than the absolute prohibitions included in its text,\textsuperscript{144} despite ultimately finding for the plaintiffs.\textsuperscript{145} At least in this instance, and to the extent that the court rejected the bright line prohibition, the Guidelines have been rejected as accurately representing the bounds of fair use.

\textsuperscript{138} Later attempts at voluntary guidelines for educators were destined to fail even to gain the level of acceptance of the Classroom Guidelines. \textit{See id.} at 622-38 (describing the failure of the CONTU and CONFU guidelines to gain general acceptance).

\textsuperscript{139} \textit{See id.} at 664 (“No court has had such a case for actually testing the [Classroom Guidelines].”). Since the distinction between commercial uses and nonprofit educational uses is significant under the first factor of a fair use analysis, the treatment of commercial uses may not be predictive of the treatment of a nonprofit use. \textit{See supra} notes 79-82 and accompanying text.


\textsuperscript{142} \textit{Basic Books}, 758 F. Supp. at 1522.

\textsuperscript{143} \textit{Id.} at 1534 (describing the instant copying as “grossly out of line with accepted fair use principles”).

\textsuperscript{144} \textit{Id.} at 1537.

\textsuperscript{145} \textit{Id.} at 1522.
In *Princeton University Press*, a for-profit copy shop compiled and sold course packs composed of excerpts of copyrighted works similar to those at issue in *New York University* and *Basic Books*.\(^{146}\) Fair use was not found in this case either, as the copying was substantial and strictly for profit.\(^{147}\) The court here described the Classroom Guidelines as providing only "general guidance," and, before finding that the use was not fair, described the copying at issue as "light years away from" the type of fair use described as appropriate in the Guidelines.\(^{148}\) The court did not rely on the Classroom Guidelines in reaching its decision.

These copy shop cases identified some weaknesses in the Classroom Guidelines. The Guidelines have not been regarded as a fully accurate statement of fair use law\(^ {149}\) and their ability to withstand further judicial scrutiny is questionable at best. Although they have been greatly influential in defining current practices, they should not be used as a substitute for the fair use analysis.

### III. Analysis

Library uses of copyrighted materials that are sufficiently analogous to permitted classroom uses should be read as permissible uses under an expanded reading of TEACH. While some library activities clearly go beyond the scope of TEACH, and likewise some go beyond the scope of otherwise authorized actions with regard to copyrighted materials, there are library actions that are most appropriately considered within the purview of TEACH.

Part III.A considers the policies behind TEACH, and argues for the inclusion of appropriate library acts within its bounds. Librarians and educators can determine the appropriateness of uses by applying the criteria emphasized by the TEACH Act—classroom-analogous use of copyrighted material as a regular part of a mediated instructional activity, and the safeguarding of owners' property against other uses—as a balancing test.\(^ {150}\) Historically, however, balancing tests do not serve the purposes of many libraries and edu-

\(^{146}\) *Princeton Univ. Press*, 99 F.3d at 1383.
\(^{147}\) *Id.*
\(^{148}\) *Id.* at 1391.
cational organizations. These organizations tend to avoid the mere specter of litigation.\textsuperscript{151} Thus, while a balancing test might provide an appropriate judicial test, it is unlikely to satisfy educational practitioners. In the absence of a bright-line test, another analysis may be necessary for these organizations to act upon privileges.

Part III.B proposes a combined fair use/TEACH analysis. A fair use analysis can illuminate the inquiry in two ways. In terms of the TEACH balancing test, fair use factors can provide a framework for considering the uses of non-owners compared to the need to protect the owners' property. Secondarily, libraries may be able to rely on fair use principles to determine whether a use intended is appropriate—not necessarily because it is TEACH-appropriate, but because a fair use analysis is a second way of justifying the uses of copyrighted materials by non-owners. Fair use concepts are more familiar to libraries and educators than the new strictures of TEACH.\textsuperscript{152} By restricting a fair use analysis to only activities that meet the threshold criteria for a TEACH use, a narrower range of possibilities is developed. These two justifications may provide a library with enough assurance that its judgment is correct to allow the activity to proceed, even in the face of its historical tendency to avoid litigation.

Finally, Part III.C explores the ways in which libraries and classrooms are established as places of special privileges under other aspects of the copyright scheme. Due to this special and analogous status, libraries should be able to participate in TEACH activities.

A. \textit{Achieving the Policies of TEACH by Including Libraries}

Reading TEACH to include libraries in the protected class of users can help more fully realize the policies intended by Congress. The objectives of TEACH are to encourage the modern forms of distance education, and to adapt the copyright law to emerging technologies used in such educational endeavors.\textsuperscript{153} Libraries are a vibrant and crucial part of modern higher education, and including libraries and librarians in TEACH protections enriches all educational endeavors. Expanding TEACH to include libraries, in the

\textsuperscript{151} See supra Part II.B.3.
\textsuperscript{152} Familiar fair use checklists can be used in this combined analysis as well. See, \textit{e.g.}, \textsc{Russell}, supra note 65, at 21.
context of the other restrictions that the Act establishes, does not disrupt the delicate balance between copyright owners and copyright users.

The expansion of rights for distance education under TEACH is merely a technological updating of policies acted upon in the 1976 revision. The current copyright laws explicitly include these new technologies. The copyright revision in 1976 included provisions designed to enable educators to incorporate copyrighted materials in classroom presentations for pedagogical use. Additionally, presentations and displays were not limited to those used in the classroom, so hallway bulletin boards, announcements, and take-home materials could be incorporated. Applications involving distance education were included in the classroom exemption as far as they could be under then-existing technology. There was no deliberate exclusion of distance education from the educational exemption; the provision of distance education has simply expanded in ways that were not anticipated by the drafters of the 1976 statutes. The updating of the copyright statutes was one step toward encouraging and enabling distance education. For a variety of reasons, including libraries in TEACH would be a further step in that direction.

1. The Role of Libraries has Expanded Dramatically

Libraries have become so intertwined with the "mediated activities" of the instructional spectrum that it makes sense to include them under TEACH. While libraries sometimes serve as a mere tool of the educator, they also have independent existence. Similarly, librarians often have other roles in education, namely as educators themselves. Because they serve the educational system in more than one way, the legal status of libraries and librarians is complicated. When libraries act as a mere tool, furthering the goals and intentions of the educators and at the educator's direction, they should be accorded a suitable status and be permitted to avail themselves of TEACH privileges. When they act on their own initi-

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156. See 17 U.S.C. § 110(2) (2000) (pre-TEACH provision allowing displays as a part of "systematic instructional activities of a ... nonprofit educational institution").
158. Id. at 9-19.
active, their actions should be evaluated either as actions of educators (if that is factually appropriate) or as outside the bounds of TEACH.

As libraries become more involved in the academic lives of the schools they serve, they become more closely tied to the mediated instructional activities that take place in these schools. Long gone are the days of the library simply as a place to check out books. Libraries today are proactive in their approaches to research. 159 Librarians readily step outside the walls of the library to inform students and faculty of all the benefits the library can offer. 160 This activity can take the form of providing current awareness services, advice on research methods and tools, instruction on library-owned materials, and guidance on how to find information not owned by the library. 161

Additionally, librarians teach research classes and guest lecture in substantive classes. This proactive approach may also manifest itself in a librarian’s visit to a classroom specifically to discuss online library resources. In a distance education setting, these classes could be delivered in whatever way each class is normally taught. It might involve a professor discussing available resources with a librarian in advance of creating student assignments. It would often include librarians ensuring access to library materials through the use of reserve collections or non-circulating material. 162

2. Expanded Privileges are Limited to Accredited, Nonprofit Educational Organizations

By the terms of the statute, TEACH privileges are limited to accredited nonprofit educational organizations, using legally ac-

159. See generally Outreach Services in Academic and Special Libraries (Paul Kelsey & Sigrid Kelsey eds., 2003).
161. Id.
162. Reserve collections and non-circulating collections often evolve with the assistance of faculty input. Reserve items, in particular, are often included in that collection at the behest of a faculty member, for the benefit of a particular class. Items that would normally circulate out of the library may be designated as non-circulating if a high demand is anticipated, as might be the case during the duration of a specialized seminar class. See, e.g., Driscoll, supra note 65, at 1; Ray Prytherch, Harrad’s Librarians’ Glossary 540, 550 (8th ed. 1995); Melamut, supra note 99, at 158 ¶ 1. These collections have increasingly been made available electronically. See Driscoll, supra note 65, at 1-5.
required copies of copyrighted materials in a mediated instructional activity.\textsuperscript{163} Thus, libraries that take advantage of TEACH must be nonprofit educational organizations, if not standing alone, then as part of a larger organization. The requirement of accreditation and the nonprofit status of the organization sponsoring the class is an attempt to limit the benefit of TEACH to bona fide educational organizations.\textsuperscript{164} As this is an extension of a statutory exemption to a statutory right, it is appropriate that the limitation be as narrowly drawn as possible to achieve the objective sought.\textsuperscript{165} By limiting the pool in this way Congress allows the majority of verifiably educational users to take advantage of TEACH, while minimizing the number of legitimate users who are inevitably and unfortunately excluded.

In light of these reasonable and considered limitations, the libraries that should be permitted to come within the TEACH privileges are simply those that are part of accredited nonprofit educational organizations. As this reasonably approximates the type of educational organizations that Congress was intending to encourage and assist by enacting the privileges, it is appropriate that these organizations' libraries be the ones that are permitted to exercise the greater privileges.

3. TEACH Privileges are Limited to Mediated Instructional Activities

TEACH privileges are granted only for "mediated instructional activities."\textsuperscript{166} These activities are displays of copyrighted materials that are analogous to what would be used in a classroom setting.\textsuperscript{167} This poses a challenge to supporters of a TEACH exemption for libraries: historically, libraries have supported a part of the curriculum separate from that explored within the classroom


\textsuperscript{164} S. REP. NO. 107-31, at 9 (2001), microformed on CIS 01-S523-1 (Cong. Info. Serv.).

\textsuperscript{165} Norman J. Singer, Statutes and Statutory Construction §47:25 (6th ed. 2000) (discussing the limitation on the maxim expressio unius est exclusio alterius: that a statute authorizing a specific course of action generally excludes others not mentioned, but that this presumption may be overcome by "a strong indication of contrary legislative intent or policy").


\textsuperscript{167} S. REP. NO. 107-31, at 9-10.
setting.  

Congress explicitly disallowed the use of TEACH privileges to display material in support of individualized research, such as for term papers. It is not suggested here that these uses now be permitted. However, the range of activities engaged in by libraries today goes beyond mere support for research outside the classroom. Many libraries have outreach programs in which librarians tailor presentations toward the educational needs of the class and work closely with professors to acquire materials for use in the classroom. Those activities that pertain closely to "mediated instructional activities" should be allowed under this expanded reading of TEACH. Some activities that libraries engage in will not qualify, but others may, depending on the depth of connection with "mediated instructional activities."

The primary issue is whether copyrighted material is provided within a mediated instructional activity. If the correct party has provided the material in the correct context, TEACH should protect that activity. The levels of support and interaction the library or librarian has with the instructor may help indicate the depth of connection between the library activity and the "mediated instructional activity." The following hypothetical situations explore the attitude copyright law should assume with regard to librarians' and libraries' actions. Assume for the following set of scenarios that the material involved is the same piece of legally acquired, copyrighted, non-dramatic work. Such works are permissibly used in the distance education setting. TEACH Act of 2002, § 13301(b)(1). Assume that the organization involved is an accredited nonprofit university, and that the technological safeguard requirements are also met. See id.


170. For an examination of various incarnations of library outreach programs, see, e.g., Corey M. Johnson et al., Instructional Outreach Across the Curriculum: Enhancing the Liaison Role at a Research University, in Outreach Services in Academic and Special Libraries, supra note 159, at 19 (describing various models for instructional outreach programs in academic libraries); Jill S. Markgraf, Collaboration Between Distance Education Faculty and the Library: One Size Does Not Fit All, in Distance Learning Library Services: The Tenth Off-Campus Library Services Conference, supra note 10, at 451 (discussing one library's efforts to work more closely with distance education faculty to provide services to students); Tom Reidel, Added Value, Multiple Choices: Librarian/Faculty Collaboration in Online Course Development, in Distance Learning Library Services: The Tenth Off-Campus Library Services Conference, supra note 10, at 477 (discussing the recent prevalence of library programs proactively reaching out to faculty teaching distance education courses).

171. Assume for the following set of scenarios that the material involved is the same piece of legally acquired, copyrighted, non-dramatic work. Such works are permissibly used in the distance education setting. TEACH Act of 2002, § 13301(b)(1). Assume that the organization involved is an accredited nonprofit university, and that the technological safeguard requirements are also met. See id.
depth of connection between the library activity and the “mediated instructional activity.”

Consider first the technologically savvy professor. Perhaps Professor Smiler is adept with technology and delights in keeping up with the latest advances in distance education mechanisms. In this case, he would likely take material to be used for the class presentation and post it himself to the course space. This clearly falls within the language of the statute and would qualify for the TEACH exemptions. It satisfies the “by, [or] at the direction of” requirement, as the educator is posting the material himself.\(^\text{172}\)

Next, consider the technologically insecure professor. Not all college professors—in fact not all distance education professors—are as adept with technology as they should be. In many instances, the library serves as a vehicle for completing the mere task of making materials available electronically to students. The librarian, Scott, may post material selected by Professor Smiler, exactly where the professor would likely have posted it himself: the established course space. In that instance, should it make a difference who has actually posted the material, provided it was selected and analyzed by the professor and made available at his request? Surely not; this too should qualify for the TEACH exemptions. There are no policies encouraged by TEACH that are not protected by this use, provided that the work is undertaken at the direction of the educator. If Professor Smiler has requested that Scott do the work, this should satisfy even a very narrow reading of “at the direction of” indicated in the legislative history.\(^\text{173}\) It is as though Scott is merely “initiating the display,” as Congress imagined might happen by a member of the class.\(^\text{174}\)

Next, consider the absentminded professor: a professor who can do the work technologically, but does not have an overall plan for distance education. Professor Smiler may not have the resources required, or access to an appropriate course space. The library’s resources may be simply the most efficient way of making the material available to students. Another way in which this could arise is by a deliberate choice at the administrative level. The library’s server space may be more suitable to hosting material of this type, due to logistical concerns, such as available disk space, frequency of back-ups scheduled, or available maintenance. It may

\(^{172}\) Id.


\(^{174}\) See id.
have absolutely nothing to do with academic concerns. This function may be served by an office devoted to providing distance education services, and Emily, the instructional technology designer, would be called upon. An accident of hardware logistics should not disqualify an otherwise valid exercise of TEACH privileges. Again, no policies are implicated that run counter to those of TEACH. As with the previous example, having Scott or Emily actually make the material available online falls within a very narrow reading of "at the direction of," and should certainly be permitted by any reading of TEACH.

The final instance presented here is that of the eager librarian. This example requires more detail to determine its disposition. After discussing Professor Smiler's new Gender Development class, Ken scours the available resources in the library, selects some for the use of the professor, and makes these works, including the copyrighted non-dramatic work in question, available online, directly from the library web page. Sensitive to copyright concerns, Ken password protects the material, and distributes the password only to Professor Smiler, for use by his class only. Ken has every intention of taking the site down once the semester has concluded. This situation speaks to the heart of the debate over the scope of "at the direction of" under the statute.

If Professor Smiler has indicated a desire to use the materials in the classroom, Ken should be permitted to exercise his professional judgment in finding and selecting the materials for inclusion, and be entitled to TEACH protections. Academic librarians are experts in their collections and often, they are also experts in the subject matter. They are trained to evaluate and select useful information for their patrons. They are not indiscriminate providers of information, running amok digitizing the entire library. Here, Ken has a good faith belief that the educator will use digitized materials in the process of teaching the class. The librarian is primarily acting as the agent of the educator in making the display possible. An action, permissible when taken by the principal, is

permissible when taken by an agent of the principal.\textsuperscript{177} The librarian is enhancing the provision of distance education and fulfilling the objectives of TEACH by taking steps that go beyond the narrow "direction" described in the legislative history, while remaining consistent with the policy objectives underlying the statute.

If Ken truly is running amok, however, with no indication that Professor Smiler desires the material for classroom use, this clearly falls outside of the aegis of even an expanded reading of the TEACH provisions. While the information is surely useful and helpful to the students in exploring the subject area, conducting research, and even developing a private understanding of the class discussion, these are activities that are traditionally not mediated by Professor Smiler.\textsuperscript{178} They are educational, to be sure, but do not fall into the category of "mediated instructional activities."\textsuperscript{179} This use of materials more closely resembles those specifically exempted from coverage by the legislative history of TEACH: "e-reserves and digital library resources."\textsuperscript{180}

An expanded reading of TEACH is justified under a consideration of the policies animating TEACH: those encouraging the effective provision of distance education, while simultaneously protecting the rights of copyright owners against excessive use of their materials. It should not matter who makes the material available. Allowing librarians to make copyrighted material available under the direction of professors retains the distinction between permissible classroom use and impermissible non-classroom use.

4. The Ambiguity of the TEACH Act Allows for a Broader Reading of the Language

Conservative arguments note that TEACH, on its face, does not apply to libraries of any sort.\textsuperscript{181} A specific inclusion of libraries

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\item 177. See 3 AM. JUR. 2D Agency § 74 (noting that the principal may authorize an agent to act to the extent of the principal's legal right to act); see also BLACK'S LAW DICTIONARY 67 (8th ed. 2004) (definition of agency).
\item 178. See generally S. REP. No. 107-31, at 9-10 (describing the exemptions as covering activities that are "part of a class itself, rather than ancillary to it").
\item 179. See 17 U.S.C. § 110 (Supp. 2004) (defining "mediated instructional activity" as an activity in which a copyrighted work is used "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," and not as including works that would be a substitute for a purchased text).
\item 180. H.R. REP. No. 107-687, at 10 (2002), microformed on CIS 02-H523-44 (Cong. Info. Serv.).
\item 181. See Hutchinson, supra note 4, at 2225-26.
\end{itemize}
\end{footnotesize}
would have been easy enough for Congress to enact, had it intended to extend legislative permission for distance education displays of materials to libraries. Generally, unless the plain language of the statute is ambiguous, there is little reason for recourse to a convoluted interpretation of the legislative history to extend legislative privileges to a group not specifically mentioned. However, this rule does not preclude the consideration of legislative intent where the language is ambiguous. TEACH is ambiguous through its lack of definition regarding the "direction" of the instructor. TEACH is also arguably ambiguous when viewed in the context of the usual activities of an academic library. The statute fails to mention libraries, and yet clearly addresses a subject matter often encountered by normally active libraries. Nearly all accredited educational organizations have libraries. This broader reading of the statute is justified by the complex realities of educational organizations and a recognition of the various ways in which these organizations act. Ambiguity in the copyright statutes should be resolved by consideration of the basic principles of copyright, especially the encouragement of socially useful endeavors such as education and the progress of science and the arts.

Publishers' groups may object to this expanded reading of TEACH, for it expands the circumstances under which non-owners can use copyrighted materials. These groups represent people who profit from the sale and licensing of copyrighted materials, so their economic interests are naturally affected by any such expansion. However, the limitations inherent in the Constitution require that the rights of owners not be absolute. These limitations form the basis of the classroom exemption, as well as the fair use doctrine. Congress has every right to define the extent of the exemption. In its wisdom, Congress has acted to encourage distance education, while simultaneously protecting the rights of copyright owners.

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182. Singer, supra note 165, § 46:01 (discussing the plain meaning rule).
183. See, e.g., Characteristics of Excellence in Higher Education: Eligibility Requirements and Standards for Accreditation Standard 11, at 33 (Middle States Comm'n on Higher Educ. 2002), available at http://www.msache.org/msache/content/pdf_files/characteristicsbook.pdf ("The availability and accessibility of adequate learning resources, such as library services and the support of professional staff qualified by education, training and experience, are essential to an institution of higher education.").
184. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).
185. See U.S. Const. art. 1, § 8, cl. 8.
186. See supra Parts I.B, I.C.
This expansion, in requiring that the educational organization own a lawful copy of the item displayed, should not affect the market for the copyright owner's product.\textsuperscript{187} It merely facilitates access and encourages the use of the copyrighted material.

B. A Fair Use Analysis of TEACH Uses by Libraries

Although TEACH and fair use are two distinct copyright doctrines, they complement each other. An organization wary of litigation may be more likely to take advantage of potentially expanded rights when the use apparently satisfies the requirements of both TEACH and the fair use doctrine. In addition, a discussion of the fair use factors may shed light on the underlying principles of copyright, which also informs an understanding of the TEACH analysis.

A fair use analysis of library use of copyrighted materials, under the restrictions imposed by TEACH, suggests that such use should usually be permitted under existing copyright law. Some key aspects of the analysis may be the same for all or many TEACH uses. A use pursuant to TEACH would, of necessity, be for an educational purpose; it would also be a nonprofit use.\textsuperscript{188} Additionally, TEACH uses will often involve making electronic copies, which are then made available through technology.

Admittedly, TEACH and the fair use doctrine are separate justifications for uses by non-owners. TEACH allows greater copyright permissions than were originally granted under the classroom exemption, while fair use provides an affirmative defense to an allegation of copyright infringement.\textsuperscript{189} They occupy different places in the copyright scheme, and there is no reason to confuse their purposes. This Note does not, however, champion a mix of doctrines; the point is simply to look at the outlines of behavior possible under an expanded reading of TEACH, and examine that behavior under a fair use analysis. It is possible that a library following the guidelines of the TEACH permissions would be thus brought quite safely within the bounds of fair use, by virtue of the TEACH restrictions and the nature of library services. It is also possible that this analysis can highlight behaviors that libraries should avoid.

Additional privileges for libraries under a fair use analysis are only relevant as a predictive device if the publishers of material are

\footnotesize{\begin{itemize}
\item \textsuperscript{187} See 17 U.S.C. § 110 (Supp. 2004).
\item \textsuperscript{188} See \textit{supra} note 47 and accompanying text (discussing the limitations of TEACH).
\item \textsuperscript{189} \textit{Patry}, \textit{supra} note 78, at 413.
\end{itemize}}
in agreement with regard to the analysis. Given the history of the copyright disputes between libraries and publishers, and the slippery nature of fair use determinations in general, it is easy to predict that libraries will be reluctant to take advantage of potential new privileges, and publishers will be skeptical of accepting them as legitimate. However, if the issue were ever to be litigated and this fair use analysis holds, new privileges could very well be established for academic libraries under the TEACH provisions. In addition, fair use determinations are commonplace in libraries; the familiarity of these considerations provides comfort that new legislative enactments do not.

1. Factor 1: Purpose of the Use

In a TEACH-like use, the first factor always indicates a possible fair use. The first factor, purpose of the use, leans towards a fair use when it is an educational or other non-commercial use. Educational uses could be instructional or scholarly. Other uses leaning towards fair use are those authorized by the statute, including comment or criticism of a work. These are also typical elements of a work presented in a classroom setting. This factor tends to indicate a use that requires permission, when it is a commercial use, for publication, or for public distribution. A use pursuant to TEACH is necessarily an instructional use, due to the “mediated instructional activity” requirement. Although this factor leans towards a fair use, the other factors must still be weighed.

2. Factor 2: Nature and Character of the Copyrighted Work

The second factor may lean towards or away from a determination of fair use in a TEACH setting. This factor favors published, factual, and non-fiction materials for a fair use determination, and disfavors any unpublished or creative works. TEACH uses may be made of favored or disfavored materials: they may be of works either published or unpublished, provided they are obtained legally. Similarly, use may be made of factual, non-fiction or fictional literary or artistic works. The TEACH Act specifically authorizes the

190. See discussion supra Part II.B.3 (detailing the history of interactions of the library/educational and publishing industries in copyright matters); see also Crews, supra note 125.
191. See supra text accompanying notes 78-83.
193. See supra text accompanying notes 84-87.
use of "nondramatic literary or musical work[s]." Thus, the TEACH limitations do not affect the second factor of a fair use analysis.

3. Factor 3: Amount of the Copyrighted Work

The third factor to consider is the amount of the work used in comparison to the whole of the copyrighted work, which might also weigh for or against fair use. As discussed above, this may refer to an actual amount, or the "most important parts of the work." The language of TEACH suggests that an educator may permissibly use the entirety of some works, while they may only use portions of others: copyright is not infringed by "the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work" provided the amount is "an amount comparable to that which is typically displayed in the course of a live classroom session." No amount limitation is specified beyond this comparison to what would be presented in a live classroom. For other works, including dramatic literary works, TEACH does impose a specific amount limitation: only a "reasonable and limited portion[]" of the work may be used.

While that phrase has not been statutorily defined, the legislative history indicates that a determination of reasonableness here would consider "the nature of the market for that type of work and the pedagogical purposes of the performance." This definition is as undefined as the fair use factor, although slightly different. TEACH seems to rely on the custom of mainstream educators; Congress may assume that most instructors are not interested in wasting class time. Since an educator's use of an entire work may be fair, the statute's authorization of the use of the entirety of literary and musical works does not remove the TEACH-permissible uses from possible determinations of fair use. The third factor

195. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841); see also supra text accompanying notes 89-92 (discussing the possibility that a use which is mathematically a small amount of the copyrighted work might still not be a fair use because it uses the best portions of the copyrighted work). But see supra note 132 (discussing the mathematical calculations of the Classroom Guidelines).
197. Id.
could easily weigh for or against fair use when only a portion of the work is used. When an entire work is used, this factor may weigh against a fair use determination, but does not remove it from the possibility of being fair.

4. Factor 4: Effect upon the Market of the Original Work

The final statutory factor of the fair use analysis examines the market effect of the use on the original copyrighted work, and likely weighs towards a fair use here. The market for the original work is affected when the likelihood of people purchasing or licensing the original work decreases as a result of the secondary use.\(^{199}\) This most often occurs when the demand for the secondary work replaces or supplants the demand for the original, as in the case of an abridgement or an annotation, or when free access to the "heart" of the original is provided in a more digestible format. Repeated use or multiple copies made of a work for non-educational purposes weigh against a determination of fair use; however, TEACH requires technological limitations on transmissions that effectively prevent students from retaining copies and using them repeatedly.\(^{200}\) This does not affect the other side of the equation, however. Teachers are still able, under TEACH, to use material term after term. It is possible that repeated uses by instructors may tip this factor away from a fair use determination. Despite possible repeated use, the factor may weigh in favor of fair use if the market is either unaffected or stimulated by the use. Either of these is likely to occur in an educational setting. It is likely that the market would be unaffected; many students are manifestly uninterested in pursuing further research or reading in an area of class discussion after the course has ended.\(^{201}\) For those students who are still inter-

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199. Melamut, supra note 99, at 183, ¶ 78 (indicating that loss of revenues from licensing satisfies the market harm factor).
200. 17 U.S.C. §§ 110(2)(C), (D)(ii)(I) (requiring that institutions "appl[y] technological measures that reasonably prevent 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 unauthorized further dissemination of the work in accessible form by such recipients to others").
interested in the material, if the copies used during class are no longer available to them, as provided under the requirements of TEACH, they may seek out the original works to purchase. Thus, an educational use may actually improve the market for a work. In such a case, a repeated use of works may, over time, dramatically increase the market for these works. At worst, the market is unlikely to be negatively impacted, as long as the technological restrictions function as intended. Therefore, the fourth factor of the fair use analysis is likely met by a TEACH-permissible use.

5. A Synthesis of Fair Use Factors Suggests TEACH Uses by Academic Libraries are Permissible

Under TEACH conditions, the fair use analysis is fairly simple, and is likely satisfied. The first factor, purpose, weighs towards fair use by definition, unless there is some additional commercial over­ tone to the use. The second factor, nature, is not determinative of fair use; however, in modern fair use jurisprudence this factor may have lost some importance. Its effect may well be minimal. The third factor, the amount of the work used, probably weighs towards fair use for most works other than nondramatic literary and musical works. For nondramatic literary and musical works, when used in their entirety under TEACH, fair use is still not precluded, but depends more heavily on the other three factors. The fourth factor, market effect, most likely weighs in favor of a fair use determination. Taken as a whole, an analysis of the factors indicates that a fair use determination is, indeed, likely in most cases.202

Where nondramatic literary and musical works are used in their entirety, the combination of the TEACH technological preventative measures and the likely market effect still indicate a potential finding of fair use. Even if a work is presented in whole, a student would be prevented from making a personal copy of the work to add to his library of pirated music. Thus, the market harm potentially caused by the use of the entire work should be reasona-
bly prevented by the TEACH provisions. That confluence of factors should mitigate the effect of using the entire work.

C. *Existing Policy Suggests Copyright Law Already Treats Libraries and Educational Settings Similarly*

A third justification for an expanded reading of TEACH relies on the position libraries hold within copyright law. Both libraries and educational settings are in similarly privileged positions within copyright law: they receive similar and expanded privileges in the copyright scheme compared to other settings. It may be reasonable to consider permitting one to take advantage of privileges granted to the other when the positions are analogous and provided appropriate safeguards are maintained. Given that the services provided by libraries in educational settings have evolved into a more analogous position with educators since this scheme was established, now is an appropriate time for such reconsideration.203

1. Statutory Exemptions Included in the 1976 Copyright Revision

Two of the major exemptions to the copyright laws as established in 1976 are the exemptions for libraries, under § 108, and for educational displays, under § 110.204 Under § 108, libraries are given broader copyright exemptions with regard to photocopies made in or by libraries. Copyright law permits libraries to provide copies of their materials to other libraries through interlibrary loans, without interference from copyright laws.205 The exemption represents statutory permission tailored to reflect the kinds of services that libraries provide, which Congress and the courts have determined are socially useful.206 Given libraries’ present activities in

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203. See supra text accompanying notes 10, 159-162.
205. Interlibrary loan involves the sharing between libraries of purchased materials, for the benefit of other libraries’ users. JOAN M. REITZ, DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE 367 (2004); see also WILLIAMS & WILKINS CO. v. UNITED STATES, 487 F.2d 1345 (1973) (discussing the copyright implications of the interlibrary loan system prior to the 1976 revisions); H.R. REP. NO. 94-1476, at 78 (1976) (Conf. Rep.), as reprinted in 1976 U.S.C.C.A.N. 5659, 5691 (indicating that the 1976 revisions to the Copyright Act were not intended to prevent libraries from engaging in interlibrary loan, provided that they do not use this system to avoid purchasing original works).
206. Permission for interlibrary loans also suggests that Congress is intentionally permitting libraries to share the use of copyrighted works only owned by one of the libraries involved in the exchange. The implications of this observation fall outside the scope of this Note.
the socially useful endeavor of distance education, additional privileges may well be deserved, despite library activities having been overlooked thus far by Congress.

Section 110, in its entirety, permits classroom and distance education displays of certain copyrighted materials for pedagogical purposes. This, too, is tailored to reflect the customary activities in the educational setting. Since the libraries under consideration in this piece are only those attached to accredited, nonprofit educational institutions, some conflation of the statutory library exemption and the statutory distance education exemption may be appropriate. Just as the changing nature of distance education has been recognized by statute, so too should there be recognition of the changing role of libraries within academia.

2. Special Privileges are Granted to Libraries and Educational Institutions Under the Digital Millennium Copyright Act

Additionally, in other areas of copyright law, libraries and educational institutions are identified as bodies deserving special permissions. The Digital Millennium Copyright Act (DMCA) generally allows copyright owners to embed in any digital medium technological protective devices to prevent the making of unauthorized copies. Reverse engineering technology to avoid or circumvent these devices is illegal; the possession of such technology is also illegal. The DMCA, however, permits libraries and educational institutions to legally possess and use such circumvention technology. This is a legislative demonstration that libraries and educational institutions occupy a special, protected place within copyright law and is further evidence that libraries and educational organizations are entitled to similar copyright privileges.

CONCLUSION

An expanded reading of TEACH, allowing libraries to take advantage of further uses of copyrighted materials then previously allowed by statute, honors the delicate balance between the rights of the copyright owners and the needs of society. Congress has de-

209. § 1201(d); Sharp, supra note 57, at 41 (acknowledging the permissions granted, and discussing the practical problems of obtaining such otherwise illegal technology).
clared a policy of encouraging distance education. Allowing libraries and librarians into the fold of protected users effectuates that policy, and aligns it with the reality of academic library activities. It does not threaten the profits to be rightfully made by copyright owners.

Many instances of libraries taking advantage of these TEACH privileges may also be considered fair uses. Some might argue that nothing is therefore gained by including libraries within TEACH. The recent history of libraries and copyright law says otherwise. An action with two legal justifications is much more attractive to a party trying to avoid litigation, than an act resting on only one. While fair use does not provide a bright line justification, the determination is familiar to libraries, and often used.

Copyright is not, and will never be, a simple and clear-cut area of law. There will always be risks involved for those who would take full advantage of the rights afforded to non-owners. An expansive reading of TEACH, including libraries in its provisions, would decrease the anxiety of libraries that participate in distance education and fulfill the policies Congress established.

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