THE DILEMMA OF DISTANCE EDUCATION AND COPYRIGHT LAW:

THE LIMITS AND MEANING OF COPYRIGHT POLICY

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I. Introduction.

The growth of distance education\textsuperscript{1} at colleges, universities, high schools, and all other educational institutions has brought with it a rapid expansion of the potential for large-scale copyright infringement and the civil and criminal penalties that may be imposed on instructors, administrators, and the institutions themselves.\textsuperscript{2} The use of an image, a paragraph, or an audio or video clip in distance education—especially in the context of web-based courses—has the potential of violating all of the copyright owner's rights under the law.\textsuperscript{3} Yet, many of these educational activities are spared from claims of infringement not only because of the expense and practical limits on rigorous enforcement of copyrights, but also because of the exceptions to the rights of copyright owners, such as "fair use," that often allow uses of works in the educational context without under fear of infringement claims.\textsuperscript{4} Little known to most educators and most copyright owners, however, is a specific exemption applicable explicitly to "transmissions" of displays and performances of works in the context of distance education.\textsuperscript{5} That statute was first enacted by Congress in 1976,\textsuperscript{6} and in 1999 the U.S. Copyright Office recommended significant changes in the law to reflect the changing nature of education.\textsuperscript{7} Both the original enactment of the statute and the proposals for revision, however, test the validity of constitutional, social, and economic policies that underlie copyright law.

This article will examine the potential infringements and the applicable exemptions that are relevant when educators use existing works in the context of distance education.\textsuperscript{8} In particular, this article will give attention to Section 110(2) of the U.S. Copyright Act, which allows limited uses of materials under certain circumstances in the context of "transmissions."\textsuperscript{9} This article will examine the serious problems with §110(2) that have caused the law to be generally ignored from the moment it was first enacted.\textsuperscript{10} Those problems have persisted over the decades, and the obsolescence of §110(2) has been unmistakable in recent years with the advent of digital technology for distance education. Quite simply, this article will in part demonstrate that existing §110(2) never has worked as intended and has little or no meaning in today's educational environment.

On the other hand, Congress and the U.S. Copyright Office seem to realize these catastrophic deficiencies of the law. At the direction of Congress, the Copyright Office delivered a report in May 1999 that recommended significant revision of §110(2).\textsuperscript{11} Yet for all of the practical issues that spring from the relationship between distance education and copyright, a statute that provides an exemption from the rights of copyright owners for the benefit of education tests the boundary between private and public interests. It also tests the constitutional policy that purports to regulate the authority of Congress to enact copyright law. This article will give special focus to the policy underpinnings of the existing law and the recommendations for revision.\textsuperscript{12} At the center of this analysis will be a statement from the Copyright Office accompanying its proposals asserting that its significant recommendations are not a change in
policy justifying an exemption but rather are a manifestation of the need to effect a major revision of the statute in order to continue the policy that Congress initially espoused in 1976.  

Part II of this article will provide a survey of the problem by exploring the growth of distance education and its potential for copyright infringements. Part III will survey the existing §110(2) of the Copyright Act and detail its origins and its problematic application to new learning environments. Part IV will provide a summary and overview of the recommendations for revision offered in 1999 from the U.S. Copyright Office. Part V will examine and compare the policies that underlie both the original §110(2) and the Copyright Office’s justifications for revision. Part VI will offer an analytical framework for isolating and comparing policies with an evaluation of their compatibility and conflict.

Part II: The Growth of Distance Education and the Potential for Copyright Infringement

Contemporary law applicable to distance education is rooted in historical distinctions between types of works—dramatic and nondramatic—rather than technological means for their dissemination. In 1856 Congress expanded copyright law to add for the first time a right of public performance of protected works. Yet Congress took this major step in increments and applied it only to certain dramatic works, apparently on the presumption that performance rights were a critical source of revenue for those products. Congress also recognizing that nondramatic works had the greater potential of making sales of copies, so performance rights were not necessarily critical. Under this law, performances of nondramatic works—whether for educational or commercial purposes—were apparently unlawful.

In 1909, Congress extended the performance right again. This time the right would for the first time encompass nondramatic works, but only in a for-profit context. Nonprofit uses of nondramatic works were permissible after 1909, as they were before. Because the rights of copyright owners simply did not cover nonprofit performances of nondramatic uses, an exemption for nonprofit education was unnecessary. Performances of dramatic works, by contrast, remained unlawful, and the 1909 Act included no special relief for the benefit of education.

The 1976 Revision Act shifted once again the basic construct of rights and limitations. Effective January 1, 1978, the rights of copyright owners were redefined to apply the public-performance right to a broad range of materials—both dramatic and nondramatic—this time without excluding nonprofit uses. Thus, to preserve nonprofit performances, Congress needed to enact an exception or limitation on the rights of the copyright owner—much like the fair-use statute Congress eventually enacted. With passage of the full revision of the Copyright Act in 1976, Congress accordingly included in Section 110 a roster of “limitations” on the rights of the copyright owner, and most of Section 110 focuses on activities that might otherwise be unlawful “public performances.”

Section 110 is a detailed enumeration of rights, clearly reflecting the interests of specific groups and organizations that Congress was choosing to benefit by not giving copyright owners
the right to control the performances of some works by members of those groups. Many applications of Section 110 specifically encompass only performances of nondramatic works, evincing a congressional intent to continue the previous dichotomy between broadly protecting the performance rights for dramatic works, while allowing performances of nondramatic works at least selectively. The one provision allows, for example, performances of religious music in churches and nondramatic music in stores that sell records or compact disks, as well as performances of nondramatic music at horticultural events and at fraternal organizations. Educators were also participants in the drafting of Section 110, and the first two subsections allow limited performance and display rights in the face-to-face classroom environment and in the context of “transmissions” for distance education.

Contemporary distance education often uses many different technologies, but all forms and varieties have potential for infringing copyright. A fundamental premise of copyright law is that it grants to the copyright owner a set of exclusive rights associated with each owned work. The copyright owner has these rights: the right to reproduce the work in copies, the right to distribute copies of the work to the public, the right to make derivative works, and the right to make public performances and public displays of the work. In addition, an amendment to the Copyright Act in 1990 granted a set of “moral rights” for certain “works of visual art.” In 1998, Congress gave copyright owners a right to provide “technological protection systems” the effectively restrict access to copyrighted materials and at the same time gave copyright owners a cause of action to prevent the removal of “copyright management information” from a work.

Of all the newly added rights of the copyright owner, one added in 1995 has proved to have profound importance for distance education. With that amendment, Congress extended in a limited manner the public performance right to the copyright owner of a sound recording. Prior to 1995, the copyright owner of a sound recording was denied all performance rights, but the performance rights did extend to the author or composer of the underlying work captured on the recording. For example, when a recording of a musical work was publicly performed on the radio, only the composer had any rights and received all royalties. In 1995, Congress granted the performance rights to the copyright owner of the sound recording—typically the performer whose voice or other activities are captured on tape—but only in the context of “digital audio transmissions” of that recording. Moreover, before February 15, 1972, sound recordings were not protected at all under federal copyright law, and none of the rights of a copyright owner applied.

When an instructor wants to use copyright protected content on a website for distance education, that simple and essential activity can potentially implicate all of the rights of the copyright owner. Making the work available on the web server ordinarily involves an initial copy or reproduction of the work. Each time a student or other user accesses that server and that work, the server makes further digital copies. This server then distributes those copies electronically to the users in order to make them usable at the user’s computer. The conversion of the work initially from one medium to a digital format for markup and access on a web server arguably raises the potential of a derivative work. The accessibility of the work at individual computer terminals can, under the definitions in the Copyright Act, constitute a public display or a public performance.
The ease of committing potential infringement escalates as distance education grows in volume and complexity. Educational institutions within states or larger regions are combining to use technologies for sharing courses. Transmissions that originate at one location reach innumerable sites. Asynchronous systems allow students to access content at their choice of location or time schedule. Computer networks for delivery of instructional content enable students to download, print, copy, and possibly further transmit the materials to others in the class or perhaps to anyone anywhere at any time.

With such resounding potential for copyright infringement, the exceptions to the rights of the copyright owner become increasingly important. Best known among those exceptions is “fair use.” Fair use is well known among educators and copyright experts as a broad and flexible statute but one with little definition and no specific assurance of its scope or meaning. Whether something is or is not fair use depends, according to the statute, on a consideration of four factors: the purpose of the use; the nature of the copyrighted work used; the amount and substantiality of the use; and the effect of the use on the value of or potential market for the original work.

Needless to say, the fair-use statute does not give any specific answers to questions about the uses of works in distance education or for any other particular activity. Congress first enacted a fair-use statute in 1976, and at the same time also enacted a series of other statutory exceptions that are highly specific and do give focused answers to many particular situations. In Section 110(2) Congress addressed the question of displays and performances of copyrighted works in transmissions for educational purposes.

III. The Meaning and Problems of Section 110(2)

The copyright law specifically applicable to distance education is set forth in Section 110(2) of the U.S. Copyright Act, which fundamentally allows, under rigorous conditions, the ability to make displays and performances of some protected works in “transmissions” for educational purposes. Like most of the statutory limitations on the rights of copyright owners, this provision is highly specific and narrow in scope. It is also the product of negotiation and compromise, and it embodies concepts of historical significance that ultimately make little sense for contemporary distance education.

A. Displays and Performances

The activities permitted under Section 110(2) are limited to “displays” and “performances” of copyrighted works, and the other rights of copyright owners remain unaffected by this law. The Copyright Act defines “display” as follows:

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images
nonsequentially.\(^50\)

In the context of education, common displays would include showing static images as part of the educational experience. Those images might be photographs, works of art, charts, graphs, printed text, or architectural or anatomical models.

The Copyright Act also defines “performance”:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.\(^51\)

Common performances in the educational setting might involve showing a film or video, playing a sound recording of music or spoken word, singing songs, playing music on instruments, acting a play, reciting poetry, or simply reading text aloud.

Even if the limitations of Section 110(2) did not exist, these many different and common displays and performances would not necessarily be infringements. First, not all types of copyrighted works have the benefit of performance and display rights. In particular, Section 106 of the Copyright Act grants performance rights only to these works: “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. . . .”\(^52\) Congress has granted public performance rights with respect to sound recordings, but only in the context of “digital audio performances.” Consequently, a sound recording may still be performed in an analog transmission without the potential of infringing that copyright.\(^53\)

A performance or display is also infringing only if it is made “publicly.” A performance or display can be made public under four general circumstances: (1) at a place open to the public; (2) at a place “where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; (3) by transmission or communication to either of those places; or (4) transmission or communication to the public “by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”\(^54\)

The live, face-to-face classroom could arguably be a place open to the public. Even if the entrance is limited to enrolled students, the assembled students in any particular course are likely beyond the customary circle of family and friends. Similarly, when the performances and displays are transmitted to other locations in the name of distance education, they may also be received by similar groups of students constituting the “public.” Moreover, in the case of a transmission of the educational content, received by students at their own time and place as distance education, the activity can be “public” even though the students are receiving the content in “separate places” and “at different times.”

Most displays and performances of protected works in education are likely to be made publicly and are likely to be of works that are subject to the performance and display rights.
Thus, the benefits of Section 110 become exceedingly important for furthering education and avoiding the serious consequences of infringement. The need for a specific exemption is especially important in light of the ambiguity of fair use.

B. Face-to-Face Teaching under Section 110(1)

The rigors and conditions of Section 110(2) can best be appreciated by comparing the law for distance education to the law applicable to displays and performances of works in the traditional, face-to-face classroom. Under Section 110(1) of the Copyright Act, nearly all displays and performances are allowed in face-to-face teaching.\textsuperscript{55} This statute allows almost any performance or display in the nonprofit educational context, when the activities are in a classroom or other similar location.\textsuperscript{56}

The concept of "face-to-face" is vital for distinguishing Section 110(1) from Section 110(2). One statute allows uses in "face-to-face" teaching, and the other statute is triggered when the uses are in "transmissions." One statute may be described as liberal or open-ended in its scope, while the other is comparatively confined and even impossibly unworkable for many educational needs. The delineation between face-to-face and transmission determines which statute applies to any given situation.

Apparently "face-to-face" does not have to be read literally. The report from the House of Representatives, which accompanied passage of the 1976 Act, states:

> The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images.\textsuperscript{57}

This explanation poses many challenges for understanding the scope of Section 110(1). In excluding broadcasts that originate outside the educational institution, the House Report suggests that the central problem the statute addresses is the action of independent broadcasters who might compete with the college or university and offer instructional programs to multiple institutions. This excerpt from the report admonishes outside broadcasts, but makes no mention of transmissions emanating from the educational institution. The report then suggests that educators may well "transmit" works, but extends "face-to-face" to situations that may well be within the statutory definition of "transmission."

The code defines "transmit" to mean a communication of a performance or display "by any device or process whereby images or sounds are received beyond the place from which they are sent."\textsuperscript{58} A communication even at close range—down the hall to another room, or across
campus to another building—could easily be argued as a “transmission” to another location. Notwithstanding the potential to call it a “transmission,” the House Report suggests that educators can display and perform works through some closed-circuit system that delivers them to other locations on the same campus—a common need for popular classes, where all students are unable to meet in one room. That capability is crucial for campuses that lack large auditoriums for basic and popular courses. This explanation also suggests that a “transmission” for purposes of Section 110(2) occurs fundamentally when the content of the course is received beyond the boundaries of a campus.59

C. Transmissions under Section 110(2)

Whatever the definition or scope, once the performance or display moves from the context of “face-to-face” teaching to “transmission,” Section 110(2) adds rigorous conditions that far outstrip the simple provisions of the preceding code section.60 The most problematic example of Section 110(2)’s narrowness is its allowance of performances only of “nondramatic literary or musical” works. Displays of works are not similarly limited. Consequently, an instructor may display any work, but performances may only be made of nondramatic works, such as readings from textbooks or novels or performing popular or symphonic music. The limitation to “nondramatic” works prevents the instructor from making performances of “dramatic” works that are allowed in face-to-face education, such as readings from plays or performances of opera, ballet, or Broadway stage musical works.61 This provision is a continuation of a dichotomy rooted in legislation from 1856.62

Less directly, Section 110(2) also does not allow two broad categories of works from being performed in distance education. First, in its listing of permitted works, the statute specifically allows nondramatic musical works, but sound recordings are a distinct copyrightable work, and they are not mentioned. At the time of the enactment of Section 110(2) in 1976, sound recordings were protectable by copyright, but the copyright owner of sound recordings did not have public performance rights.63 Therefore, sound recordings did not need to be listed in Section 110(2) in 1976, because no limitation was needed when no right existed. With the addition of performance rights for digital sound recordings, however, digital transmissions for distance education that include sound recordings could be infringement.64

A second broad category of works not permitted under Section 110(2) comprises all audiovisual works, from filmstrips to motion pictures. While audiovisual works are not mentioned in that code section, “literary works” are listed, and the Copyright Act defines “literary work” in part as a work “other than a motion picture or other audiovisual work.”65 Consequently, as one part of the law allows nondramatic literary works in distance education, another part of the law uses a definition to exclude an entire category of works. Unlike the omission of sound recordings, these works are excluded regardless of whether the transmission is digital or analog. The omission of audiovisual materials under Section 110(2) is complete, whether they are dramatic or nondramatic, whether they are commercially viable or have little market potential, whether they are educational in nature or feature-release films, and whether the instructor uses the entire film or just a portion of it.
To draw a line between allowed and disallowed works in the educational context has subtle, but profound, consequences. Many other provisions of copyright law make similarly abrupt distinctions among works, but most of those provisions apply to commercial enterprises that have the ability to study applicable law and build a business plan within the given parameters. If the music industry has the benefit of a “compulsory license” only with respect to nondramatic works, then a firm can engage in the business of exercising that license only as applied to nondramatic works, and negotiate an independent license for dramatic works.65 If the business planner can see advantages and profits within the law, then the business can move forward. By contrast, an educator ordinarily has little or no access to legal advice for instructional planning, and the decision to play a piece of music or to show a video clip does not ordinarily even hint of legal concerns among many educators, and an institutional decision to monitor the materials used in teaching would likely raise serious concerns about free speech and academic freedom. Quite simply, a legal structure that may well work in commercial enterprise may have little ability to succeed in the academic setting.

D. Conditions to Using Section 110(2)

The limitation on the types of works allowed in distance education may be the most prominent difficulty with the statute, but Section 110(2), subparts (A) through (C), sets forth requirements for enjoying even the limited benefits of the statute, and the current growth of web-based distance learning will encounter severe problems with complying.

Subsection (C)(i) requires that the transmission be “primarily” for “reception in classrooms or similar places normally devoted to instruction.”67 Closed-circuit systems that transmit to a classroom or other facility set aside for instruction should be able to meet this condition,68 but instructional programs delivered on the Internet are often intended to reach students wherever they may be located—whether at home or at work or elsewhere.69

If an institution is unable to meet the requirement of Subsection (C)(i), it may in the alternative comply with Subsection (C)(ii), which requires that the transmission be “primarily” for students who are unable to attend in the classroom because of their “disabilities or other special circumstances.”70 Again, this provision may not be the open authority to deliver distance education freely into homes and offices, but it does allow the college or university to single out students who may qualify to receive the transmission at other locations. Whether those students may qualify depends on their reason for not coming to classrooms. If the reason is simply for the ease and convenience of students, that may not be a “special circumstance.” If the reason is because students are unable—because of work, family obligations, or personal conditions—to attend class at the appointed time, then the program may well qualify under Section 110(2). The House Report endorses this view:

Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced
workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason.\textsuperscript{71}

While the law provides some degree of flexibility to meet the changing circumstances of education, the conditions to applying Section 110(2) pose serious obstacles for educators seeking to receive the benefits of the law in furtherance of their teaching plans.\textsuperscript{72}

E. Beyond Displays and Performances: Making Copies

An overall difficulty of applying either Section 110(1) or 110(2) to the needs of education is that neither section permits the making of any copies whatsoever. While making copies for classroom use has generally been the subject of fair use, and not Section 110, copies are often necessary to effectuate the display or performance. Start with the simplest example. Under 110(1), an instructor can make a display of a work in a classroom, but often the instructor will need a copy of the image, text, chart, or other work onto a transparency. The display is clearly permissible, but the instructor is at best left to apply the vagaries of fair use to justify making the single copy.

The need for copies increases as distance education expands into Internet delivery. The Internet has been described as a rapid and large-scale “reproducing machine.”\textsuperscript{73} Distance educators speak of “synchronous” and “asynchronous” delivery, and fundamentally asynchronous delivery usually necessitates making a copy of the content available resident on a server or other system where students may access them at their own time and pace. Synchronous delivery is most often transmitted in real time, with live performances and displays, and a copy need not always be made and stored at the place of original transmission. At the outset, therefore, asynchronous delivery usually calls for at least one copy to be made and placed on the server.

Whether the delivery is asynchronous or synchronous, however, the process of transmitting content through the Internet involves a flourishing and proliferating sequence of reproductions. The communication system of the Internet makes copies of works at nodes across the country and around the world. Recipients of the transmission, for example through access of a website, are automatically making copies of the content into the memory of the local computer, even without keystroking commands to save or download. Investigators can also tell of supposedly deleted email that is found in backup systems on multiple servers. Copying is one of the central and necessary processes of the Internet. While the process of making a performance or display is sometimes allowed under Section 110(2), none of these copies is specifically allowed under that law.\textsuperscript{74} Educators and students are left again to fair use under Section 107 to
possibly sanction the reproductions.\textsuperscript{75}

One specific type of copy is allowed under current law as an adjunct to distance education. Most educational institutions often want copies of transmissions for use by students who missed a class and by faculty who want to review and improve their teaching methods. Sometimes those copies are also used for further transmission by the originating institution, and by other organizations that also qualify for the Section 110(2) opportunities. Section 112(b) of the Copyright Act expressly allows a nonprofit institution that makes a transmission containing a display or performance allowed under 110(2) to make no more than thirty copies of such transmission, if: (1) no further copies are made from those copies, and (2) those copies are destroyed within seven years after the date of the first transmission, except one copy may be preserved for archival purposes.\textsuperscript{76} Clearly, Section 112(b), like Section 110(2), was written in 1976 at a time when television transmission was the main delivery mode, and copies onto videotape were scarce and easily monitored and controlled by the institution.

While Section 112(b) is important when it is applicable, it is inherently limited. It only grants rights to the institution to make and keep copies; it does not grant rights to students to make or download copies, and it does not specify any right to distribute those copies to students or other institutions or any other recipient.\textsuperscript{77} This provision also applies only to transmissions that comply with Section 110(2). For example, if the transmission includes only displays of works or performances of nondramatic literary or musical works, then Section 112(b) may apply. If other copyrighted works are included in the transmission, then the institution must either excise them before making or keeping the copies, or seek permission, or turn to fair use.

\section*{F. The Need for Change}

The preceding summary of current law for distance education evidences many reasons why the law fails to have any practical meaning for current Internet delivery systems and the realities of educational decisionmaking. Clearly, the law bears little relationship to the necessities of distance learning through digital technologies, where students may access works at diverse locations other than a "classroom," and where the transmission necessarily involves some incidental copies in order to make the display or performance of a work possible.\textsuperscript{78} Moreover, the disallowance of whole categories of works forces illogical barriers on the advancement of learning. Indeed, one can make the case that Section 110(2) has been of limited applicability and has made little sense even in the context of television-based transmissions of 1976. One test of the law's overall lack of acceptance has been the lack of legal action initiated under this code section since 1976, and the general lack of awareness of the law among educators and administrators who are ostensibly responsible for adherence to it.

Section 110(2) has been a phantom statute ever since its passage in 1976. No reported court cases give significant attention to its provisions, and no ruling is based on it terms. Few manuals and handbooks on the subject of copyright law for educators give significant attention to the statute.\textsuperscript{79} In fact, at least one manual specifically on the issue of the use of copyrighted works in distance education gives detailed attention to the factors under fair-use law, but only obliquely
mentions concepts from Section 110(2). The law simply has been overlooked and disregarded. Perhaps the language and structure of the statute itself is too convoluted for educators and other professionals not trained in the law. Perhaps any law regulating displays and performances in the educational setting is intuitively not what educators expect. Perhaps this particular statute always has been too arcane to have any reasonable meaning for modern education. Moreover, the lack of lawsuits also suggests that copyright owners have little awareness or understanding or the law, or have no realistic means of monitoring uses of works to enforce their legal rights.

While the code provision has lurked for years as something of a phantom, the growth of distance education—especially on the Internet—has provoked heightened awareness of the applicability of copyright and awareness in particular of the potential role of Section 110(2). With that awareness came growing concern about the clear problems with Section 110(2) and the difficulties of giving workable meaning to fair use under Section 107. The growth of Internet delivery also has brought three major changes in the relationship of education to copyright law. First, instructional activities are more easily observed and found by copyright owners. Activities that were once relatively privately concealed in the classroom are now on the World Wide Web, where copyright owners can send “crawlers” and other programs to find and report uses of protected works. Second, materials delivered digitally can be easily downloaded, uploaded, and further transmitted. The potential for abuse and proliferating copies is vastly simplified. Third, networked systems and educational programs are often overseen by administrators and staff who have the opportunity to monitor uses and give guidance on proper implementation of technology. That oversight often brings with it the capability of guiding or reviewing the lawful use of copyrighted works in instruction, in a manner that is often impossible or even prohibited in the traditional classroom setting.

These developments have only underscored the failure of Section 110(2) as a workable standard. These developments also have drawn attention to a statute that previously remained far out of sight and out of mind. In recent years, Section 110(2) has become the object of discussion and analysis among interested parties who previously gave it little or no attention. The problems with the law also reached Congress, and in October 1998 Congress charged the U.S. Copyright Office with the duty of studying the law and reporting back with recommendations for possibly revising the law to support the growth of digital technologies in distance education.

IV. Recommendations for Revision from the U.S. Copyright Office

In May 1999 the U.S. Copyright Office delivered to Congress a detailed report that addressed many of the difficult issues surrounding the use of copyrighted works in distance education. The Copyright Office also proposed revisions to the law that would achieve a more meaningful and workable balance between the rights of copyright owners and users, while promoting the continued growth of distance education using digital technologies. The Copyright Office report responds directly to the many serious problems with adapting existing law for distance education to modern technologies. The report is an ambitious study that surveys problems with existing law, identifies the underlying policies for striking a balance between
protecting the rights of copyright owners, and articulates suggested solutions that would allow educators to use works under limited circumstances.

The report makes important recommendations for revising the statute in response to the conditions of digital distance education. Most significantly, the recommendations would expand the scope of materials that may be used in distance education, notably by eliminating the current proscription of "dramatic" works and audiovisual works. On the other hand, the proposal would allow only "limited portions" of those works in a manner consistent with the "nature of the market for that type of work and the pedagogical purposes of the use." For example, an instructor could use "the equivalent of a film clip, rather than a substantial part of the film." The report declines to define the parameters of "portions," and in any event many educators are likely to object to the constraint on teaching from the full work, while proprietors are certain to criticize the harm to potential sales of the works to the students.

The Copyright Office would broadly allow the copying that is essential for accomplishing Internet delivery of instruction, such as the necessary intermediate copying, and placing the materials on a server for student access during the academic term when the course is offered. The report also makes clear that the content should be transmitted to locations far beyond the traditional classroom or similar locations, as the current law provides. The Copyright Office has recommended that Congress allow educators to transmit the content of distance-education courses to enrolled students, regardless of their physical location.

These recommendations are built around a vision of instructors making displays and performances in the context of "mediated instruction." In particular, the Copyright Office identified concerns with the prospect of "electronic reserves" or other arrangements whereby entire works are made available for students to access at their discretion, thus potentially substituting for sales of those works. To facilitate uses of works for educational purposes, however, the report recommends that works be used in a context where the instructor is illustrating a point or where the use is an integral part of a course structure. In this context, the "portion limits" may not always be onerous; in customary instruction, a faculty member might usually use only excerpts of a work, offering analysis or class discussion to accompany it.

Instructors who reap the benefits of the expanded right of use must also assume some responsibilities for limiting the risks to the copyright owners. First, the transient copies that result from the digital transmission may be retained only as needed to complete the transmission. Instructors will need to review and delete save files periodically. Second, the institution would need to develop policies that describe copyright law and must provide those policies to students, faculty, and others. Third, the transmission to students must include a notice that the content of the transmission may be subject to copyright protection. Fourth, the institution would be required to implement technological protections that reasonably prevent unauthorized access and further dissemination of the material.

Perhaps the most troubling limitation on teaching appears in a footnote near the end of the report. The report is offering details for amending Section 112 to specifically permit
instructors to "upload a copyrighted work onto a server" in order to facilitate a transmission, when this footnote pointedly appears to dampen all improvements proposed in the report:

The limitation that the work whose performance or display is transmitted must be in digital form is intended to ensure that the exemption does not itself authorize digitizing a work in analog form. Such authorization must be obtained from the copyright owner, or found in another provision of the law such as fair use.\textsuperscript{103}

The Copyright Office is making a most important point in a cryptic and remote mention that copyrighted works may be used in digital distance education, but only if they are already available in digital format. If the Copyright Office is suggesting that analog images, text, and sound cannot be digitized for transmission—even within the parameters of limited access, portion limits, and mediated instruction—the report has introduced a severe and perhaps insurmountable circumscription on the scope of works that may be made available for teaching and learning.

V. Policies Underlying the Law and the Proposals for Revision

Any study of policy supporting a specific law or proposed law must begin with two policy perspectives: the general policy underlying the law, and the specific policy behind the individual provision in question. Fortunately, in the case of copyright and the law for distance education, the record offers considerable evidence to identify and understand those policies.

A. The Policies of U.S. Copyright Law

The underlying purposes, objectives, and justifications for copyright law begin with the U.S. Constitution which grants to Congress the power to make copyright law, and patent law, but does so with a stated social objective:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.\textsuperscript{104}

To fulfill that constitutional objective, copyright law in the United States has developed around a long-standing policy that the law should serve simultaneously two competing and sometimes conflicting purposes.\textsuperscript{105} The law establishes a set of rights that belong initially to the creator of works, and the law limits that set of rights by allowing to the public the right to make certain limited uses of the work.\textsuperscript{106} The law serves the public interest in other ways as well, such as by providing for the expiration of copyrights after a period of years and by not extending copyright protection to several broad classes of works that are deemed to be better left without protection.\textsuperscript{107}
B. Policy Foundations of the U.S. Copyright Office Report

In its report from May 1999 the U.S. Copyright Office provided elaborate explanations and justifications for its recommendations.\(^{108}\) This article will identify and explain many of them, but central to the report’s position is a stated belief that the recommendations may well effect meaningful changes in the law, but without changing the policies that justify the current law with all if its conditions and restrictions. One key statement tells much:

Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods. In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.\(^{109}\)

According to the Copyright Office, the law has become obsolete, but the policy for it has not. The law needs to be changed to preserve and continue that policy. Implicit in such a statement is that the policy behind the new proposal and behind the existing law can in fact be identified and compared, and that one will find a similarity or even identity of supporting policy. What is that policy underlying Section 110(2)? The Copyright Office report offers some insight:

The exemptions in section 110(1) and (2) embody a policy determination that certain uses of copyrighted works in connection with instruction should be permitted without the need to obtain a license or rely on fair use. In 1976, with the current Copyright Act was enacted, Congress expressed the intent to cover in these two sections together “all of the various methods by which performances or displays in the course of systematic instruction take place.” As explained [earlier in the report], the technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery method for systematic instruction. Without an amendment to accommodate these new technologies, the policy behind the law will be increasingly diminished.\(^{110}\)

While the report does not take a detailed look at the past, it does offer many detailed points of policy and principle to justify the proposed changes. If the policies from the past are carried forward in the proposed changes, then the Copyright Office’s articulation of justifications for new law must be the same policies that supported the enactment of the existing Section 110(2) in 1976. This article will compare the policy statements made in 1999 to the statements made as the 1976 legislation moved toward passage.

The Copyright Office report includes many statements of principles to support its recommendations. Those principles evidence a choice of position that the Copyright Office is adopting from among a range of alternatives.\(^{111}\) Indeed, if the Copyright Office were to simply expound that “education is good” in support of an exception for distance education, that statement would evidence a choice of other labels—“bad,” “mediocre,” “divine”—that one could
attribute to education. While the report’s statements are seldom so pedestrian and never so facetious, the report is rich with supporting statements that demonstrate a value judgement or policy position.

This section of the article will identify those policy statements and group them under general headings that provide insight into policy that is shaping decisions within a federal agency and that may shape a revision of the statute should Congress act on the report.112

Policy: The law should enable the use of technology in furtherance of social good.

The Copyright Office clearly endorsed the social merits of encouraging distance education and sympathized with the motivations that draw students to such programs. These statements from the report capture that sentiment:

Many students drawn to distance education are professionals whose jobs prevent them from attending classes on a campus.113

Retirees often take advantage of distance education opportunities as well. Greater disposable income and/or greater leisure may lead older students to take courses for life-enhancing reasons, rather than for academic or professional advancement. Senior citizens may choose to take courses online due to restricted mobility or a desire to study privately.114

Once accepting the social merits of distance education, the report extends the concept of social good by finding it in the application of the law itself: “[P]rimary goals [of education and library groups] are to avoid discrimination against remote site students. . . .”115

In making that statement, the Copyright Office is firmly advancing not only a positive perception of distance education, but also a positive perception of the role of the law to advance distance education. The Copyright Office could easily have adopted a neutral position on the merits of distance education. Without determining whether distance education was either a worthy or disdainful pursuit, the Copyright Office report might have proceeded to find no particular role for the law in advancing it. Instead, the Copyright Office chose to be supportive of both the quest and the function of government to advance distance education.

Policy: The law can compensate for difficulties in the effort to obtain licenses efficiently and economically.

Licensing of copyrighted works for use in distance education was a major issue in the consideration of an exemption.116 If licensing were to function efficiently and economically, an exemption may not be necessary. If licenses were successfully made between copyright owners and educators, the Copyright Office might conclude that the marketplace is operating well and needs no adjustment through an act of Congress. Instead, the report notes the frequent inability of educators to successfully secure licenses and to secure them at reasonable prices. “Success”
and “reasonable” are evaluative terms that alone reflect a choice by the Copyright Office about its view of the marketplace and experiences with distance education and licensing. The report gives extensive review of the problems with licensing and concludes:

These problems [with licensing] can be broken down into three categories: difficulty locating the copyright owner; inability to obtain a timely response; and unreasonable prices or other terms.¹¹⁷

Likewise, with the growing emphasis on multimedia works in distance education, copyright owners such as educational publishers are incorporating more, and more varied, preexisting works, increasing their need to license content from disparate sources.¹¹⁸

Each point in that statement reflects a choice from among possible conclusions. First, copyright owners are often not easy to locate. Copyrights may be bought and sold, publishers go out of business, the authors pass their copyrights to heirs with no mention of copyrights in a will or probate proceeding. “Difficult” is a relative term, and copyright owners can be equally difficult to find in connection with any project, not merely distance education. Second, copyright owners sometimes give quick responses to requests for permission, severely delayed responses, or no response at all. Again, distance education is not unique in facing these circumstances, and what may seem to be a severely delayed response to an educator waiting to make teaching plans may be a duly completed task to an overworked secretary at a small publishing house. Copyright owners also have no legal duty to reply at all to requests for permission; in some respects the Copyright Office is building the justification for an exemption on the failure of copyright owners to fulfill a duty they do not have under the law. Third, copyright owners in general have the right not to license their works, or to impose fees without limitation in exchange for the grant of a license. The law imposes no requirement of “reasonableness” on fees, and any determination of reasonableness is an imposition of a value system to attribute acceptability or tolerability on prices, and by implication identify prices that are not acceptable.

A willingness of the Copyright Office to acknowledge problems with licensing and to critique copyright owners in terms of efficiency and economics is to adopt a policy position.¹¹⁹ The Copyright Office could have chose rationally to declare that copyright owners have the right to charge any fee and to delay response or not respond at all; the Copyright Office could also have considered the testimony of educators and found that their experiences with licensing were within the bounds of “reasonableness” or perhaps similar to other experiences with licensing and therefore not demanding a resolution that is distinctive to distance education. Instead, the Copyright Office assumed a critical position and chose to characterize the evidence in such a manner that it manifested a problem, and the Copyright Office accepted the policy that the problem is one that Congress should address through legislating a revised exception to the rights of copyright owners.

Policy: The law should adapt to meet the practical realities of education.
The fundamental purpose of copyright is to promote the progress of science and the useful arts, and Congress attempts to fulfill that purpose by granting rights to owners and balancing those rights with exceptions that are exercisable by the public. The history of fair use and other rights to use copyrighted materials is built on a practical application of the law to achieve a pragmatic result. Defendants asserting fair use in court cases generally have not sought to exercise the law for its own sake, but rather have used the law to define a course of conduct that serves some practical objective. Kinko's made coursepacks to exploit a business opportunity; Detroit Public Television used a clip of music to make a meaningful and appealing video production.\footnote{120}

The Copyright Office report similarly notes the practical necessities of some copying and transmission in order to accomplish desired outcomes of distance education:

In its current form, section 110(2) limits the location to which transmissions may be sent: they must be made primarily to a classroom or similar place normally devoted to instruction; to persons whose disabilities or other special circumstances prevent classroom attendance; or to government employees. The nature of digital distance education makes this limitation conceptually and practically obsolete. The fundamental goal is to permit instruction to take place anywhere. Remote site students may access instructional materials wherever they can use a computer—from their homes, from the workplace, or from a library. Eliminating the physical classroom limitation would better reflect today's realities.\footnote{122}

This proposed amendment would not constitute an extreme expansion in the coverage of the exemption. The statute already accommodates the needs of students who cannot attend a physical classroom because of "special circumstances" other than disabilities. The legislative history makes clear that Congress envisaged the term "special circumstances" to include those "who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason." The amendment would add those students who are able to attend classes, but prefer to learn at a time and place of their own choosing.\footnote{123}

This language, with its emphasis on "realities" and "choosing," manifests an extraordinarily blunt decision by the Copyright Office that the law should serve pragmatic outcomes. Many of the other policy statements in the report center on policies that are intrinsic to the law itself, such as the need to balance rights of ownership and rights of use, or the need for the law to compensate for limitations and barriers in the marketplace. These policy statements, by contrast, are a proposition that the law be revised to meet the needs of users, and even the preferences and choices of users.

Policy: Exemptions Should Counter Expanded Legal Protections for Owners
Copyright law is at its core a quest for a balance between the rights of copyright owners and the users. Fundamentally, the law grants rights to users in Section 106, but the law then tempers those rights with limitations and exception in Sections 107 to 121. The Copyright Act has manifested that basic structure since its earliest enactment, and it became especially well established with the revision of the full code in 1976. Amendments to the Act since 1976 often have evidenced a continuation of the policy of balance. On the other hand, many amendments to the copyright since 1976 have expanded the rights of copyright owners, but at no time has Congress revised Section 110(2) to offer a concomitant expansion of rights to the public.

Indeed, many of the new rights of copyright owners directly undercut some of the intended applications of the law. In particular, in 1995 Congress amended Section 106 to grant to copyright owners of sound recordings a right of public performance of those works in the context of a "digital audio transmission." Congress also amended Section 114 to elaborate on the limited application of the new right. For the first time, however, sound recordings had performance rights, and that right could easily apply to transmissions of music, spoken word, and other recordings as they may be used in web-based or other digital distance education. Consequently, from 1978 to 1995, sound recordings could be transmitted in distance education without infringing on the owner’s rights. Beginning in 1995, however, sound recordings gained limited performance rights, thus creating new and perhaps unintended barriers to distance education. The Copyright Office report notes this situation:

When section 110(2) was enacted in 1976, there was no public performance right for sound recordings. Educators were therefore free to transmit performances of sound recordings to students without restriction (assuming that the use of any literary or musical work embodied in the sound recording was authorized by statute or license). It was not until 1996 that owners of sound recordings were granted an exclusive public performance right, limited to certain digital audio transmissions. At that time, there was no discussion of whether sound recordings should be added to the coverage of section 110(2).

The failure to include sound recording in the scope of current section 110(2) does result in a discrepancy between a distance educator’s ability to perform nondramatic musical works and her ability to perform the sound recording in which it is embodied. In other words, the copyright owner of the music is essentially subsidizing some distance education activities, while the record producer remains free to charge for the same activities. One question is whether this makes sense, when typically a teacher will perform a musical work by playing a sound recording, rather than by a live performance.

An another example of adjusting the balance, the Digital Millennium Copyright Act of 1998 greatly expanded the rights of copyright owners by creating new forms of legal violations that can arise when one circumvents technological protection systems and when a user removes "copyright management information." These new rights are especially intended to give important reassurance to copyright owners seeking to make works available in a digital
environment, where works may be easily copied, disseminated, and altered. Technological protection systems, for example, can also be deployed to limit access to materials on a distance-education website, and the law can also give some assurance that unauthorized access or other abuses can lead to civil or even criminal action. The Copyright Office once again noted that these expanding rights of owners can be used to grant a correspondingly greater grant of rights to users.  

Technological protection measures [under the DMCA], as they continue to develop and enter into widespread use, are likely to make copyright owners more comfortable with licensing digital uses.  

These provisions [of the DMCA] should assist in lessening some of the risks involved in digital distance education.  

In this context, the Copyright Office report notes that distance-education systems can be deployed with appropriate limits on access and use both to create the technological protection systems that the DMCA secures, and simply to create practical barriers to the misuse of the copyrighted works: “It is therefore critical, if section 110(2) is expanded to cover digital transmissions, that safeguards be incorporated into the statute to minimize these risks.”  

Policy: New Exemptions Should be Created When Existing Exemptions Fail  

Congress has created numerous specific limitations on the rights of copyright owners, but Congress nevertheless is reluctant to inflate the code with new provisions if current language can serve the purpose. The fair-use statute has nearly unlimited potential for interpretation and application to a wide variety of unpredictable situations. Fair use can also be construed narrowly or broadly, and regardless of one’s approach to the law it invariably creates some confusion and poses some limits. Nevertheless, fair use has continued to serve as a recourse for possibly allowing activities that do not fit the parameters of a more specific right of use, such as Section 110(2).  

The Copyright Office noted in its report that fair use was proving to be an unsatisfying recourse for addressing needs that were outside the boundaries of Section 110(2):  

It also became apparent during the course of the hearings and comment process that a number of misunderstandings cloud the public’s conception of fair use. Most fundamental is a lack of awareness that fair use in its current form does apply in the digital environment, or that it does not exempt all nonprofit educational uses. In addition, a number of commentators evinced confusion about the relationship between the fair use doctrine the specific exemptions in section 110. It was not clear to all that these are separate defenses, with fair use claims able to be asserted for conduct that does not fall within the detailed conditions of section 110.
The Copyright Office also noted that fair use has been a persistent source of confusion, and recent efforts to develop guidelines that interpret the law as applied to distance education largely have failed.\textsuperscript{144}

Similar confusion occurred with regard to the meaning and effect of fair use guidelines. Some seem to interpret the absence of formally established guidelines dealing with the application of fair use in the digital environment as having a negative implication about the availability of fair use as a defense, or to believe that guidelines define the outer limits of permissible conduct.\textsuperscript{145}

Ultimately, the entire process [of developing fair use guidelines] became controversial, . . . [in part] because of conflicting views of the value and function of fair use guidelines generally. . . .\textsuperscript{146}

Consequently, the Copyright Office found that Section 107 has failed to address adequately the needs of distance education and accordingly has given rise to the need to enhance the narrow language of Section 110(2).\textsuperscript{147}

**Policy: Exemptions Should Recognize that Technology can Offer Solutions**

The Copyright Office report looks optimistically to the ability of the technology that creates the problem to solve the problem as well. Just as digital networks can facilitate the rapid duplication and dissemination of works, so can encoding create restrictions on access and limits on duplication: “Technology can protect copyrighted works in many ways. It can restrict access to the work, restrict uses of the work and identify the terms and conditions of using the work. In some circumstances it can also find copies of the work on the World Wide Web and report their existence to the copyright owner, who can determine whether the copy is authorized. While there is a substantial degree of overlap in these technologies, they can be separated into technologies that limit access to the works, and technologies that prevent or detect uses of works after access.”\textsuperscript{148}

The report looks optimistically to the prospect that effective technological systems will be available in the near future:

With the ever-increasing ability to transmit huge amounts of material quickly and easily over computer networks, copyright owners and users in all sectors recognize the need to provide security for that material. Many technology companies and content-provider groups are working to develop technologies for protecting works in the digital environment that will be viable in the marketplace. Industries are also collaborating among themselves in an effort to develop broadly-based, effective technological standards.\textsuperscript{149}
Policy: Exemptions Should Encompass Activities that are Technologically Inevitable

The nature of digital technology is that reproduction and other potentially infringing activity is inevitable; the Copyright Office therefore notes the need to craft exceptions to the rights of copyright owners in order to allow the inevitabilities of technology. When distance education was conducted principally by television broadcast, the displays and performances could be carried live, and the content could be disseminated to students by means of the one original recording or other material object that the instructor might possess and control. Section 112(b) permits limited copying of the telecast of the instructional experience with the embodied performed or displayed copyrighted works. But nothing in Section 110(2) anticipates either the need to make a copy of a work in order to facility the transmission in the first place, or the copies that might arise as a passive and necessary consequence of the technology, or the copies that a student might make of the work for further study and review. Some of these activities may well be within fair use, but the Copyright Office also emphasized that fair use had largely failed to be used within the marketplace to give an enhanced meaning to Section 110(2).

The Copyright Office clearly wanted to permit the essential copying that the technology generates:

[D]igital transmission by definition involves multiple acts of reproduction, and often distribution, which are not covered by section 110(2). Therefore, even if the performance and display were exempted, these digital transmissions would result in an infringement unless the accompanying acts of reproduction and distribution were otherwise authorized.

Moreover, with the growth and easy availability of new technologies, teachers are simply able to engage in practices that were not feasible in the past:

In the years since online courses have become prevalent, faculty members have tended to create their own content without incorporating much third-party material. This may be in part because the technology used to create such courses has not in the past facilitated the inclusion of preexisting content. This situation is changing, as faculty become more technologically sophisticated, and more commercial software packages become available.

C. Policies Underlying Existing Section 110(2)

At the core of the Copyright Office report is the statement that the policies underlying its proposals for reform of the distance-education statute are consistent with the underlying policies of the current law. Those policies may be discerned from the legislative history leading to passage of the current Section 110(2). Congress enacted the current law in 1976, but much of the language of Section 110(2) took shape in draft bills that were the subject of hearings in 1964 and 1965. At that time the concept was labeled "educational broadcasting," and many
publishers and educators took a strong interest in the development of the law and its potential for allowing some uses of protected works.

Policy: **Balance in the Law**

Then, as now, the central policy of the law was to find a balance between rights of ownership and rights of use. Speaking at the hearings in 1965, the Deputy Register of Copyrights noted the need to create exceptions, and noted the limits of current exceptions. The Deputy Register summarized the 1909 Copyright Act, then in effect, explaining that the performance of a nondramatic work under the 1909 Act "by an educational or other nonprofit radio or television station . . . is not an infringement of copyright. . . ." Congress already had cleared the ability for educators to use at least nondramatic works, simply because the performance right extended only to dramatic works. Implicit in this point is the need to create a specific exception for education, if Congress were to expand the performance right in general to nondramatic works. As is often at the foundation of the law, grants of rights to owners are balanced by rights to the public. Congress eventually took exactly that step by expanding owners' rights, and enacting Section 110(2) to create an educational exception. That exception, however, only applied to nondramatic works; it only specifically counterbalances the new right granted to owners, and it does not extend the rights of users to dramatic works.

The Deputy Register also noted that the 1909 Act does not specifically allow any right to make copies of the telecast: the making of ephemeral copies "is a right that is not granted in the present law and is thus an additional limitation on the author's exclusivity." The spokesperson for the Copyright Office was once again taking inventory of the current balance of rights and noting whether that balance might be tipped askew with each proposed piece of legislation. In the end, the Copyright Office supported a right to make a copy of the broadcast and to keep and use it for limited purposes, emphasizing that such a provision would be an expansion of rights of users over the 1909 Act. While proprietors were present to argue for tighter limits on uses of works, educators testified for broader rights of use. A bill that fully satisfies neither side might manifest the desired balance.

Policy: **Exemptions Should Serve the Social Good**

The hearings from 1965 are replete with statements about the importance of distance education and the need for the law to serve the social objectives of education. A spokesperson for the National Association of Educational Broadcasters criticized the requirement that the transmission be received only in classrooms and similar places, and he used words that echoed some of the testimony heard again in 1999: "The place-of-reception criterion in the bill for distinguishing between exempted and nonexempted educational uses of copyrighted materials is drawn upon what appears to be the arbitrary basis of where the message is received and fails to recognize the true purpose of the educational broadcaster. Such criterion . . . will result in shortsighted and unsupportable discrimination among people who have the greatest need for educational services through broadcasting." Drafters of the statute in 1965, and drafters of the
report in 1999, were looking to some of the same concerns: facilitating quality education, and reaching a variety of students in diverse locations, and preventing discrimination among those students by restricting the content and the educational experience that some of them will receive.167

Policy: Exemptions Should Compensate for the Impracticalities of Licenses

Just as the 1999 report from the Copyright Office focused on the practical limitations of licenses, so did Congress hear some testimony before enactment of the 1976 Act about the travails of requiring educators to secure permissions for individual uses. A college administrator responsible for educational television services noted that without a specific exemption for the benefit of nonprofit performances, educators would be held to the same standard as commercial broadcasters: “College and university instructors, under these constraining conditions, would be unwilling to present radio or TV courses in modern literature, fine arts, etc.”168

Policy: Exemptions Should Accommodate Expanding and Inevitable Technology

Naturally, not everyone supports the revision and expansion of the current law, and not everyone supported the law as originally drafted. Whatever the constraints and restrictions in the statute, it will invariably interfere with the interests of some copyright owners. That Congress chose to enact the legislation over such objections can also suggest the policies that Congress was seeking to uphold. A representative from the publishing industry, the American Textbook Publishers Institute, testified in 1965 against the bill that would allow the use of new technology—even television broadcasts—for distance education: “The proposed bill not only continues these [current] rights but appears to go much further. It appears to provide free use by educational institutions of copyrighted materials not only in the commonsense, traditional manner but by the use of machines.”169

In the end, Congress chose to accommodate the growing use of those machines. Indeed, another publisher representative, from the American Book Publishers Council, noted the inevitable growth of distance education: “But nonprofit television is now becoming a major educational instrument reaching simultaneous audiences of hundreds of thousands. It is certain to grow.”170 A study from 1964 indicated “over 11½ million enrollments in televised courses.”171 Congress chose in the Copyright Revision Act of 1976 to accommodate the new technologies and not to interfere with their inevitable growth. Congress and the interested parties in the 1960s and 1970s likely never anticipated anything quite like the Internet and its vast potential for expanding distance education and posing added risks to copyright owners. Yet Congress responded then to the need to meet the inevitabilities of technology. The 1999 report from the Copyright Office asks Congress to do the same.172

VI. Conclusion

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The report from the U.S. Copyright Office on the subject of distance education is a most commendable accomplishment, especially in light of the complexity and contentiousness of the issues and the excruciatingly tight deadline that Congress imposed on the Copyright Office.\textsuperscript{173} On the surface, the report is a critical and insightful overview of current practices for distance education at educational institutions throughout the country. The report also underscores a series of constructive, and ultimately balanced, recommendations for revising existing Section 110(2) of the Copyright Act. In its depth of analysis, however, the report offers thoughtful and cogent articulations of policy in support of the recommendations.

At the center of the policy analysis underlying the Copyright Office recommendations is the statement that the policy justifications for revising the statute is a need to preserve the policies that supported the existing statute.\textsuperscript{174} The report seeks to create continuity of policy objectives, and it generally succeeds. A look back at copyright policy in general and at the policy justifications that Congress considered before enacting the current Section 110(2) reveals that in fact the 1999 report is in keeping with established policies and objectives. Most fundamental, the law has sought a balance between rights of owners and rights of users. The law also has sought to achieve socially desirable goals, such as education. The law also has adapted through the years to accommodate the inevitabilities of new technologies.

This policy analysis reveals much about Congress and the nature of statutory development. Copyright developments, each in its own incremental fashion, can respond to technological demands and realities. Statutes can be revised to accommodate new technologies, and lawmakers are often motivated to accomplish exactly that outcome. But Congress also seeks to integrate technology as a solution to the problem that technology engenders in the first place. Thus, just as technology unleashes a vast potential for infringement, so can innovations allow for controlling access and minimizing the risks of abuse of copyrighted works.

Perhaps most revealing in this study is that despite the ongoing revolution in technology and the rapid expansion of distance education, Congress continues to look for the familiar and elusive balance between the interests of securing rights to owners and simultaneously fostering the social benefits of education. That balance is a direct outgrowth of the constitutional principle that Congress has power to grant rights, but is to do so in furtherance of advancing knowledge and learning. Rights and limits in the law implement that ideal.

That balance is overtly pragmatic in its effect and in its creation. Quite bluntly, this study of the distance-education statute reveals that Congress has in the past, and likely will in the future, rely on interested parties to articulate positions, and Congress will identify a statutory construct that leaves divergent views equally satisfied and dissatisfied. Congress has the pragmatic duty of crafting a statute that manifests compromise, and that in the process it would ideally achieve something approximating the constitutional balance as well. Congress is clearly striving to address multiple policies in developing the law, but foremost is the quest for that balance between owners and users.\textsuperscript{175}

If Congress in fact has achieved that balance with regard to any aspect of copyright law, it has attained an extraordinary goal. In the context of conflicting lobbying efforts and powerful
interests bearing on the legislators, however, a true balance may be impossible to identify. Moreover, any balance is perceived as relative to the weight of counterbalancing views, and any position on distance education or any other copyright issue can always be recast as an ideal medium between two other possible positions. If the goal is to find a balanced application of the law, almost any statutory language can arguably be cast as balanced. Therefore, the difficult challenge of finding the proper scope of user rights for distance education must reflect on a complex host of underlying policy objectives, and not merely find justification as a balance between opposing interests.

1 “Distance education” may be defined broadly as the delivery of instructional content to students who are located at some geographical location—or at multiple locations—other than the place from which the delivery originates. The geographical distance between point of transmission and place of reception need not be great. See Lisa Guernsey, Distance Education for the Not-So-Distant, CHRON. HIGHER ED., Mar. 27, 1998, at A29-A30 (finding that many students enrolled in online courses are also enrolled in regular courses on campus). Thus, distance education may encompass television transmissions, websites, or even radio broadcasts. Critical to the concept for purposes of the copyright implications examined here is that the content is perceived by students through a display or performance of the work facilitated by instructor and not necessarily through the making of copies. This article will use the label “distance education” principally because it corresponds with the choice of terms in the 1999 report from the Copyright Office. Other labels that sometimes appear in the literature include “distance learning,” “distributed learning,” “online courses,” or “web-based delivery.” Early literature used terms that now seem anachronistic, such as “educational broadcasting” or even “correspondence courses.” See generally U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 9-10 (1999) [hereinafter DISTANCE EDUCATION REPORT] (“There is general consensus on the most fundamental definition: distance education is a form of education in which students are separated from their instructors by time and/or space.”). The report from the U.S. Copyright Office on distance education is available on the U.S. Copyright Office site at <http://lcweb.loc.gov/copyright>.


3 For a general study of copyright law applicable to distance education, see Kenneth D. Salomon, A Primer on Distance Learning and Intellectual Property Issues 96 ED. L. REP. 305 (1995).

4 Fair use is codified in Section 107 of the U.S. Copyright Act, but it is only one of many statutory exceptions to the rights of owners. See 17 U.S.C. §§ 107-121. This article focuses primarily on Section 110(2).

5 Many publications survey numerous aspects of distance education, but seldom mention copyright issues. See, e.g., Janis H. Bruwelheide, Copyright: Opportunities and Restrictions for the Teleinstructor 71 NEW DIRECTIONS FOR TEACHING AND LEARNING 95 (1997) (surveying briefly the issue of fair use and Section 110 and concludes in part “Ask permission from copyright owners”); Tom Clark and David Else, Distance Education, Electronic Networking, and School Policy (1998) (surveys briefly various federal policy initiatives without mentioning copyright); Going the Distance: A Handbook for Developing Distance Degree Programs Using Television Courses and Telecommunications Technologies (1992) (examines the administrative issues surrounding the delivery of content, but does not mention copyright); Gerald C. Van Dusen, The Virtual Campus: Technology and Reform in Higher Education (1997) (advises educators about the need to stay abreast of federal communication regulations, but includes no mention of copyright); John R. Verduin, Jr. And Thomas A. Clark, Distance Education: The Foundations of Effective Practice (1991) (no mention of copyright issues in the index).


The legal literature has given little analytical attention to Sections 110(1) and 110(2). See, e.g., Francis M. Nevins, Copyright, Cassettes and Classrooms: The Performance Puzzle 43 J. COPYRIGHT SOC'Y U.S.A. 1 (1995).

The Copyright Act includes this definition: "To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101.

See infra text accompanying notes 78-85. For example, an early article summarized the significance of the new Copyright Act as applied to education, and it offered only two short, descriptive paragraphs about Section 110(2). See Don Lawrence Pitt, Comment, Education and the Copyright Law: Still and Open Issue 46 FORDHAM L. REV. 91, 108 (1977). See also Bernard Korman, Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act 22 N.Y.L.S. L. REV. 521, 525 (1977) (mentioning blithely that Sections 110(1) & (2) "are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place").

DISTANCE EDUCATION REPORT, supra note 1.

See infra text accompanying notes 104-172.

See infra text accompanying notes 109-110.


In 1897 Congress extended the performance right to musical playscripts. Act of January 6, 1897, ch. 4, 28 Stat. 481.

See Bernard A. Grossman, Cycles in Copyright 22 N.Y.L.S. L. REV. 653, 664 (1977) ("The rationale seems to have been that performances were a tangible representation of a product of the mind which had been captured and made reproducible.").


The extent of the exclusion of nonprofit uses was tested in the case of Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d. 852 (2d Cir.), cert. denied, 323 U.S. 766 (1944). The court ruled that a for-profit radio station that was operated by a nonprofit entity was not exempt from paying royalties for performance rights. See generally Note, Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights, 51 IOWA L. REV. 1049, 1053 (1966).


17 U.S.C. § 106 ("the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . .").

Some critics of the legislation argued that Congress was not merely preserving the nonprofit performance right as allowed under the 1909 Act, because the use of television technology enabled performances to reach more viewers and have a more significant harmful consequence for copyright owners: "When the performance right ‘for profit’ was included in the copyright law with respect to nondramatic works, ‘nonprofit’ performance was generally face to face, largely in churches, classrooms, club meetings, etc. But nonprofit television is now becoming a major educational instrument, reaching simultaneous audiences of hundreds of thousands. It is certain to continue to grow."


17 U.S.C. § 110 ("Notwithstanding the [rights of copyright owners], the following are not infringements of
copyright...).  

25 Section 110 permits the display and performance of works as detailed in this article, but other subsections apply to churches, restaurants and taverns, agricultural and horticultural fairs, fraternal and veterans’ organizations, and transmissions to persons who are blind. 17 U.S.C. § 110.

26 Only a few of the activities permitted under Section 110 include the use of dramatic works. Section 110(1) for face-to-face teaching applies to all types of works. Section 110(3) allows places of worship to perform a “nondramatic literary or musical work” or a “dramatico-musical work of a religious nature.” Section 110(5)(A) permits a business establishment in effect to allow customers to hear performances of all types that are received through a common radio or similar device. Section 110(9) allows the single, isolated performance and transmission of a dramatic work for the benefit of persons who are blind or have other disabilities. This provision includes several extraordinarily tight conditions and requires the dramatic work to have been “published at least ten years before the date of the performance.” 17 U.S.C. § 110. All of these decisions by Congress to allow certain activities at the possible expense to copyright owners are a matter of public-policy determination. See generally GROVER STARLING, THE POLITICS AND ECONOMICS OF PUBLIC POLICY: AN INTRODUCTORY ANALYSIS WITH CASES 9 (1979) (defines “redistributive policies” as involving “a conscious attempt by the government to manipulate the allocation of wealth, property rights, or some other value among the broad categories of private individuals in society”).

31 17 U.S.C. § 110(1) & (2).
38 17 U.S.C. § 106(6) (“the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”). This subsection was added to the Copyright Act pursuant to the Digital Performance Right in Sound Recordings Act, Pub. L. 104-39, 109 Stat. 336 (1995). The 1999 report from the Copyright Office notes the importance of this particular development. See DISTANCE EDUCATION REPORT, supra note 1, at 79.
39 The Copyright Act grants the public performance right with respect to “musical works,” which are distinct from a “sound recording.” 17 U.S.C. § 106(4).
40 While the performer may well hold the copyright to the sound recording in many cases, as a practical matter performers often have assigned rights to producers or production companies, and in 1999 Congress amended the definition of “work made for hire” to encompass sound recordings under some circumstances, leaving the copyright with the employer and not with the performer. 17 U.S.C. § 101.
41 17 U.S.C. § 301(c).
42 For a general study of the implications of copyright law for new technologies, see Trotter Hardy, The Internet and the Law: Copyright and “New-Use” Technologies 23 NOVA L. REV. 657 (1999).
43 The Copyright Act includes this definition:

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.
17 U.S.C. § 101. Consequently, a work available on a website can easily be accessed and hence displayed or performed at places open to the public, or where a substantial number of persons is gathered, even if they access it individually.


49 Portions of Part III of this article are based on material that the author included in an earlier publication. See Kenneth D. Crews, Copyright and Distance Education: Displays, Performances and the Limitations of Current Law, in GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY 369 (Laura N. Gasaway ed., 1997).


53 Either an analog or digital transmission of the sound recording could still be an infringing performance of the copyright protected musical composition or other work that is the subject of the recording.


55 The full text of Section 110(1) is as follows:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made. . . .


56 Scrutinizing the language of Section 110(1) reveals four essential conditions to applying the law: performance made by instructor or pupils; in face-to-face teaching; in a nonprofit institution; and in a classroom or similar place. In addition, Section 110(1) adds the final clause against using copies of videotapes and other audiovisual works that are known to be infringing. 17 U.S.C. § 110(1).


59 The standard of reaching beyond the campus is consistent with the general statement of permission that accompanies many videotapes that are marketed for educators and academic libraries. Such statements often allow closed-circuit transmissions, and often only to sites on the same campus where the transmission originates.

60 See supra note 55.

61 The statute alone does not specify whether members of the class may simply recite lines from a dramatic work or make a dramatic reading of a nondramatic work, such as a novel. The House Report from 1976 sheds some light on Congress's intent: "a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form." House Report, supra note 57, at 83.

62 See supra text accompanying notes 14-18.

63 See supra text accompanying notes 38-41.

64 See supra text accompanying note 40.

The House Report makes explicit that such places may include studios, libraries, and other facilities, as long as they are used for instructional purposes at some designated times. House Report, supra note 57, at ___.

The House Report from 1976 makes no mention of an individual's house as a place of instruction, although the report does refer frequently to educational television and radio of such a nature that their signals may be received at home. That language would support the argument that the home is increasingly a place "devoted to instruction" for many students. Seemingly in contradiction, the House Report specifically anticipates transmission via cable systems that enable other members of the public to view the class and consequently to receive the transmissions of copyrighted works. According to the House Report:

the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made "primarily" for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the "primary" purpose of a program would include its subject matter, content, and the time of its transmission.

House Report, supra note 57, at 83. Hence, instructors can broadcast via cable, but the content and other circumstances should be clearly oriented toward creating a learning environment, and not toward making a work of general interest to the cable viewers.

The statute could have been even more restrictive. An early Senate bill would have added the requirement that the transmission have this geographical limit: "the radius of the area normally encompassed by the transmission is no more than one hundred miles." S. 597, 90th Cong., 1st Sess., § 110(2)(B) (1967). For an expression of deep concern about that provision, see Eugene N. Alienikoff, Educational Television—A Non-Commercial Viewpoint 53 IOWA L. REV. 880, 883 (1968).

I can attribute this description to Professor Robert Kreiss, University of Dayton School of Law, which he made at a meeting of the Society of Ohio Archivists on October 16, 1999.

The current Section 110(2) is silent on the subject of making copies and facilitating asynchronous delivery of instructional content; infringing a right of use from silence is easily open to criticism. An early version of the provision, however, did specifically prohibit asynchronous delivery with this added condition to the right of use: "the time and content of the transmission are controlled by the transmitting organization and do not depend on a choice by individual recipients in activating transmission from an information storage and retrieval system or any similar device, machine, or process." H.R. 2512, 90th Cong., 1st Sess. (1967). One commentator concluded that this language "is deliberately aimed at preventing the full use of presently existing technology by forbidding the use of information-retrieval systems in conjunction with an ETV system." Note, Wasteland, supra note ___, at 124. The same writer insightfully addressed the future feasibility of computer systems that could allow access to instructional content from remote locations, and noted the benefits to education as well as the threat to copyright owners. Id., at 124-25.

Although Section 112(b) specifically allows the institution to make copies, and does not mention any right of distribution or transmission of those copies, the House Report details that the thirty copies may be used for future transmissions by the original source, or they may be exchanged with other broadcasters for their transmission.


See supra note 5.

See ROBERT HEINICH, ET AL., INSTRUCTIONAL MEDIA AND TECHNOLOGIES FOR LEARNING 386-88 (5th ed. 1995). This particular publication is most confounding. In a few pages, it surveys fundamentals of copyright law as relevant to educators. Under the subheading of "Distance Learning Settings," the authors outline a few points
derived from scattered and unrelated copyright sources, including a few points drawn from Section 110(2) without citation. The authors then conclude sweepingly: "If the class is being recorded, it is a definite copyright infringement if prior approval for material presentation is not obtained." Id., at 388.

The legislative history of § 110(2) suggests another critical reason why the statute has been neglected and overlooked. Much of the language of the provision was developed in 1964 and 1965, when the House of Representatives held extensive hearings on it. See infra text accompanying notes 156-57. Active in those hearings were officers of educational television systems, while educators and librarians had a lesser role. By the time the statute was enacted in 1976, educators were focused more on § 107, distance education had shifted from elaborate broadcasting systems to more individualized pursuits, and in the normal span of a dozen years the individuals active in 1965 were likely involved in other occupations. With the passage of time, the statute Congress enacted had become disconnected from the individuals who had in the meantime stepped into some responsibility for implementing it.

See, e.g., AMERICAN COUNCIL ON EDUCATION, DEVELOPING A DISTANCE EDUCATION POLICY FOR 21ST CENTURY LEARNING (2000) (emphasizing the need for new institutional policies for distance education, notably the need for policies addressing the use of copyrighted works). This report is available at:

The inapplicability of 110(2) and the problems with interpreting 107 were underscored in the Conference on Fair Use (CONFU), an informal gathering of interested parties, under the aegis of the National Information Infrastructure Task Force, seeking to develop mutual understandings or "guidelines" on fair use. The final report from CONFU includes a draft of "Proposal for Educational Fair Use Guidelines for Distance Learning." INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, November 1998, at 43-48. Like most proposals in the CONFU report, these guidelines became the object of extensive debate and disagreement and ultimately were not widely accepted in the educational community. For a general discussion of the guidelines, their origins, and the surrounding controversies, see Laura N. Gasaway, Guidelines for Distance Learning and Interlibrary Loan: Doomed and More Doomed, 50 J. AMER. SOC'Y INFO. SCI. 1337 (1999).

Of course, some methods for carrying out distance education, notably the creation of websites, are prone to individual development without necessitating centralized oversight.


DISTANCE EDUCATION REPORT, supra note 1. Part IV of the present article is based in part on portions of an earlier essay by this author. See Kenneth D. Crews, The U.S. Copyright Distance Education Report 3 INFO. OUTLOOK 44 & 46 (1999).

Other commentators have suggested various revisions to Section 110(2). See, e.g., Laura N. Gasaway, Copyright: A Challenge to Distance Learning-Part I, ___ INFO. OUTLOOK 43, 43 (1998) ("The best solution for education is to amend the Copyright Act to make it clear that distance learning is the modern equivalent of face-to-face instruction.").

DISTANCE EDUCATION REPORT, supra note 1, at 140-59.

DISTANCE EDUCATION REPORT, supra note 1, at 154-55.

DISTANCE EDUCATION REPORT, supra note 1, at 158.

DISTANCE EDUCATION REPORT, supra note 1, at 158.

DISTANCE EDUCATION REPORT, supra note 1, at 158-59.

Specifically, the Copyright Office is contemplating the "transient copies" that are "part of the automatic technical process" of the transmission. The Copyright Office does not suggest that educators should be allowed to make copies of works for students in distance learning: "Rather, the amendment should include these rights only to the extent technologically required in order to transmit the performance or display authorized by the exemption."

DISTANCE EDUCATION REPORT, supra note 1, at 146-47.

DISTANCE EDUCATION REPORT, supra note 1, at 148-50.

DISTANCE EDUCATION REPORT, supra note 1, at 148-50.

DISTANCE EDUCATION REPORT, supra note 1, at 147-48.

DISTANCE EDUCATION REPORT, supra note 1, at 143 & 148. Like distance education, electronic reserves was the subject of discussion in CONFU, see note 83 supra, but the final report did not include the text of draft guidelines that emerged from the process. For an examination of the unusual processes and controversies surrounding this
issue in CONFU, see Kenneth D. Crews, Electronic Reserves and Fair Use: The Outer Limits of CONFU 50 J. AMER. SOC'y INFO. SCI. 1342 (1999) (written by the present author, who was a participant in the CONFU proceedings).

Distance Education Report, supra note 1, at 148.

Distance Education Report, supra note 1, at 151.

Distance Education Report, supra note 1, at 151. Recent amendments to the Copyright Act have in other respects begun to require users of copyrighted works to take the initiative to inform others about copyright protection. For example, the Digital Millennium Copyright Act, 105-304, 112 Stat. 2860, ____ (1998), offered possible protection for online service providers when users of networked systems commit copyright infringements. In some instances, the provider is obligated to give users “materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.” 17 U.S.C. § 512(e)(1)(C).

Distance Education Report, supra note 1, at 151. When libraries make copies of materials under Section 108 of the Copyright Act, they are currently required to include on the copies the formal copyright notice found on the original work. If no such notice appears on the original, then the copies may include only “a legend stating that the work may be protected by copyright.” 17 U.S.C. § 108(a)(3).

Distance Education Report, supra note 1, at 152. This proposal builds on the new provisions of the Copyright Act that prohibit the circumvention of technological protection systems that control access to copyrighted works. 17 U.S.C. § 1201(a). See also infra text accompanying notes 133-139.

Distance Education Report, supra note 1, at 161 n.379.

U.S. Const., Art. I, Sec. 8.


But see Theodore R. Jackson, Copyright Exemptions and the Educational Media 6 PERFORMING ARTS REV. 30, 36 (1977) (arguing that the Copyright Clause allows Congress to grant rights to owners, not necessarily to create limitations or exceptions).

See, e.g., 17 U.S.C. § 102(b) (precluding copyright protection for ideas, processes, and many other creations); 17 U.S.C. § 105 (barring copyright protection for works of the U.S. government).

Distance Education Report, supra note 1, at 140-46.

Distance Education Report, supra note 1, at 144.

Distance Education Report, supra note 1, at 144-45 (quoting from the House Report, supra note 57, at 81). The Copyright Office report added that the critical issue is not how to expand owner’s rights or user’s rights, but instead how to preserve the “policy balance struck in 1976.” Id., at 145. One early commentator argued for the need to grant a right of use for distance education in order to achieve a constitutionally required balance against the broad rights of copyright owners. See Note, Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights, 51 IOWA L. REV. 1049, 1062 (1966).

Public policy analysis is premised on identifying a set of goals that policymakers seek to achieve, and the identification of goals implies a choice from among alternatives. See, e.g., Charles L. Cochran & Eloise F. Malone, Public Policy: Perspectives and Choices 1 (1995) (“Public policy consists of political decisions for implementing programs to achieve societal goals.”). See also Stuart Nagel, Policy Studies: Integration and Evaluation 3 (1988) (“Public policy analysis can be defined as the process of determining which of various alternative public or governmental policies will most achieve a given set of goals in light of the relations between policies and goals.”).

A staff member of the Copyright Office recently stated publicly that Congress was not likely to take any action in response to the distance-education report until into the 107th Congress. [See 59 Patent, Trademark & Copyright J. (BNA) 645 (Mar. 10, 2000).

Distance Education Report, supra note 1, at 20.


Distance Education Report, supra note 1, at 132.

Distance Education Report, supra note 1, at 29-47.

Distance Education Report, supra note 1, at 41-42.

Distance Education Report, supra note 1, at 31.
While most discussion of licensing in the report centers on the inability of educators to secure licenses in an efficient and economical manner, the report also briefly suggests that a meaningful statutory exception could actually facilitate the making of licenses for the benefit of all parties. While describing the problems that librarians in particular have faced, the report adds: “They also point out that the scope of legal exceptions can affect the relative bargaining power of copyright owners and users.” DISTANCE EDUCATION REPORT, supra note 1, at 135.


DISTANCE EDUCATION REPORT, supra note 1, at 149.

DISTANCE EDUCATION REPORT, supra note 1, at 150 (quoting from House Report, supra note 57, at 84).


Notably demonstrating this process was the amendment of the Copyright Act in 1980 to specify that computer software was protectible; at the same time Congress revised Section 117 to grant to users the right to make copies of computer programs for limited purposes. Similarly, in 1990, Congress specified that architectural works were within the purview of copyright, and Congress simultaneously added Section 120, which allows the public to make pictures or other illustrations of constructed architectural works without infringing the rights of the copyright owner.


A sound recording typically embodies at least two copyrights. First, the performer whose voice or music is captured on the recording holds a copyright. Second, the composer or author of the content holds a separate copyright. The discussion at this stage of the article refers only to the rights in the recorded performance. An educator may well have not infringed on that right, but could easily have infringed on the rights of the composer or author when making the transmission of the work.

DISTANCE EDUCATION REPORT, supra note 1, at 156.

DISTANCE EDUCATION REPORT, supra note 1, at 157.


The report carefully preserves, and explicitly avoids interfering with, the right of copyright owners to “apply technological protections to their works.” DISTANCE EDUCATION REPORT, supra note 1, at 152.

DISTANCE EDUCATION REPORT, supra note 1, at 44.

DISTANCE EDUCATION REPORT, supra note 1, at 102.

DISTANCE EDUCATION REPORT, supra note 1, at 150.

The Copyright Office report notes that bills in Congress in 1997 would have revised Section 110(2), but Congress exhibited little inclination to act on them. DISTANCE EDUCATION REPORT, supra note 1, at 119-121.

For an example of the difficulty of bringing some practical meaning to fair use, see Janis H. Bruwelheide, Copyright and Distance Education 21 LIBR. ACQUISITIONS: PRACTICE & THEORY 41 (1997).

The interrelationship between fair use and a specific exception for distance education has been debated since the earliest drafts of the Copyright Act of 1976. See, e.g., Note, Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights, 51 IOWA L. REV. 1049, 1061-62 (1966).

DISTANCE EDUCATION REPORT, supra note 1, at 130.


DISTANCE EDUCATION REPORT, supra note 1, at 130.
DISTANCE EDUCATION REPORT, supra note 1, at 112. Later the report notes: "As discussed above, the topic of guidelines as a whole has become controversial in recent years, at least in part due to concerns about their tendency to be treated as absolute rules, and their impact on possible legislative alternatives." **Id.** at 131.

The Copyright Office report suggests that the rulemaking exceptions to the prohibition against circumvention of technological protections, 17 U.S.C. § 1201(a)(1)(C), could encompass uses for distance education. DISTANCE EDUCATION REPORT, supra note 1, at 103. As of this writing in early 2000 the Copyright Office is holding hearings and considering possible exceptions.

DISTANCE EDUCATION REPORT, supra note 1, at 58.

DISTANCE EDUCATION REPORT, supra note 1, at 57.

DISTANCE EDUCATION REPORT, supra note 1, at 146-47.


See supra text accompanying notes ______.

DISTANCE EDUCATION REPORT, supra note 1, at 83. The report ultimately recommends that educators be allowed to make "ephemeral copies" of transmissions largely to make the transmission possible, but not necessarily to retain the materials on a site "for later access by students." **Id.** at 160-61.

DISTANCE EDUCATION REPORT, supra note 1, at 38.

See supra text accompanying notes 140-147.


H.R. 4347, 89th Cong., 1st Sess. (1965). Section 109 of this bill has language remarkably similar to the provisions of the current Section 110(2), suggesting that the current statute is built not only on circumstances from 1976, but on conceptions of distance education from yet a decade before. In its most germane provision, the 1965 bill provided that the following is not an infringement: "performance of a nondramatic literary or musical work, or exhibiton of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution."

The Deputy Register argued for the need to reform copyright law in general with a reflection on the rapid pace of technology he witnessed in 1965, which offers insight about the technological revolution of more recent years. He noted that the law was last fully revised in 1909: "As some of us can recall, that might be termed a 'horse and buggy' era. This was long before the technological development of radio, Telstar, tape recorders, longplaying high-fidelity phonographic recordings, electronic computers, xerographic copying machines, and Cinemation motion pictures in full color. So you can see that there is a reason why this horse-and-buggy law needs to be brought up to date." U.S. House of Representatives, Copyright Law Revision, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, Part I, at 40 (1965) (remarks of George D. Cary, Deputy Register of Copyrights) (hereinafter House Hearings, 1965).


The Deputy Register also argued that the pending bill reflected an appropriate balance between the needs of education and the interests of copyright owners. House Hearings, 1965, supra note 158, at 39-40.

Not everyone from the Copyright Office was certain that the bill would only reflect a continued balance of owner and user rights. Abe Goldman, then general counsel to the Copyright Office, noted that the 1909 Act did not grant a public performance right for nonprofit uses of nondramatic works; the bill allowed nonprofit broadcasts, but only for transmission to classrooms and similar places. Consequently, if the bill were law, the ability to use nondramatic works would not be as broad, and even nonprofit entities would not be able to transmit nondramatic works to the public in general at various locations. House Hearings, 1965, supra note 158, at 55-56 (remarks of Abe Goldman).

See also House Hearings, 1965, supra note 158, at 65 (remarks of Kenneth B. Keating).

House Hearings, 1965, supra note 158, at 40.

House Hearings, 1965, supra note 158, at 40.

See, e.g., House Hearings, 1965, supra note 158, at 317 (remarks of Harold E. Wigren for Ad hoc Committee of Educational Institutions and Organizations on Copyright Law Revision).

One member of Congress anticipated exactly this outcome. Testifying in 1965, Congressman Emanuel Celler stated: "I am advised that the publishers and authors on the one side and the educational groups on the other have now dug in and are engaged in positional or trench warfare." House Hearings, 1965, supra note 158, at 1854. The
congressman proceeded to predict that the subcommittee would not recommend giving either side all that it seeks. *Id.*, at 1855.


167 Compare to the concern about “discrimination” quoted at text accompanying note 115 *supra*.


169 House Hearings, 1965, *supra* note 158, at 69 (remarks of Lee Deighton). The witness added: “The end result of this free use would be to displace the educational materials we publish and ultimately destroy our market.” *Id.*, at 69.

170 House Hearings, 1965, *supra* note 158, at 140 (remarks of Horace S. Manges). Naturally, to the publishing industry, this growth was perceived as a threat to the market for publications, and Mr. Manges argued that nondramatic works should receive the same protection that dramatic works receive, asserting that the distinction between dramatic and nondramatic works “is no longer reasonable.” *Id.*, at 140.


172 See *supra* text accompanying notes 150-154.

173 In October 1998 Congress directed the Copyright Office to prepare the report according to detailed criteria and to deliver the report within six months. See Digital Millennium Copyright Act, Pub. L. 105-304, § 403, 112 Stat. 2860, ___ (1998).

174 See *supra* text accompanying notes 109-110.

175 One undesirable result of this dynamic is that it places on Congress all responsibility for finding the balance, and it encourages the interested parties to take strident positions in anticipation of a compromise outcome. In this context, hearings are likely to elicit inevitable conflict and little voluntary reconciliation.
THE DILEMMA OF DISTANCE EDUCATION AND COPYRIGHT LAW:

THE LIMITS AND MEANING OF COPYRIGHT POLICY

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I. Introduction.

The growth of distance education\textsuperscript{1} at colleges, universities, high schools, and all other educational institutions has brought with it a rapid expansion of the potential for large-scale copyright infringement and the civil and criminal penalties that may be imposed on instructors, administrators, and the institutions themselves.\textsuperscript{2} The use of an image, a paragraph, or an audio or video clip in distance education—especially in the context of web-based courses—has the potential of violating all of the copyright owner’s rights under the law.\textsuperscript{3} Yet, many of these educational activities are spared from claims of infringement not only because of the expense and practical limits on rigorous enforcement of copyrights, but also because of the exceptions to the rights of copyright owners, such as “fair use,” that often allow uses of works in the educational context without under fear of infringement claims.\textsuperscript{4} Little known to most educators and most copyright owners, however, is a specific exemption applicable explicitly to “transmissions” of displays and performances of works in the context of distance education.\textsuperscript{5} That statute was first enacted by Congress in 1976,\textsuperscript{6} and in 1999 the U.S. Copyright Office recommended significant changes in the law to reflect the changing nature of education.\textsuperscript{7} Both the original enactment of the statute and the proposals for revision, however, test the validity of constitutional, social, and economic policies that underlie copyright law.

This article will examine the potential infringements and the applicable exemptions that are relevant when educators use existing works in the context of distance education.\textsuperscript{8} In particular, this article will give attention to Section 110(2) of the U.S. Copyright Act, which allows limited uses of materials under certain circumstances in the context of “transmissions.”\textsuperscript{9} This article will examine the serious problems with §110(2) that have caused the law to be generally ignored from the moment it was first enacted.\textsuperscript{10} Those problems have persisted over the decades, and the obsolescence of §110(2) has been unmistakable in recent years with the advent of digital technology for distance education. Quite simply, this article will in part demonstrate that existing §110(2) never has worked as intended and has little or no meaning in today’s educational environment.

On the other hand, Congress and the U.S. Copyright Office seem to realize these catastrophic deficiencies of the law. At the direction of Congress, the Copyright Office delivered a report in May 1999 that recommended significant revision of §110(2).\textsuperscript{11} Yet for all of the practical issues that spring from the relationship between distance education and copyright, a statute that provides an exemption from the rights of copyright owners for the benefit of education tests the boundary between private and public interests. It also tests the constitutional policy that purports to regulate the authority of Congress to enact copyright law. This article will give special focus to the policy underpinnings of the existing law and the recommendations for revision.\textsuperscript{12} At the center of this analysis will be a statement from the Copyright Office accompanying its proposals asserting that its significant recommendations are not a change in
policy justifying an exemption but rather are a manifestation of the need to effect a major revision of the statute in order to continue the policy that Congress initially espoused in 1976.  

Part II of this article will provide a survey of the problem by exploring the growth of distance education and its potential for copyright infringements. Part III will survey the existing §110(2) of the Copyright Act and detail its origins and its problematic application to new learning environments. Part IV will provide a summary and overview of the recommendations for revision offered in 1999 from the U.S. Copyright Office. Part V will examine and compare the policies that underlie both the original §110(2) and the Copyright Office’s justifications for revision. Part VI will offer an analytical framework for isolating and comparing policies with an evaluation of their compatibility and conflict.

Part II: The Growth of Distance Education and the Potential for Copyright Infringement

Contemporary law applicable to distance education is rooted in historical distinctions between types of works—dramatic and nondramatic—rather than technological means for their dissemination. In 1856 Congress expanded copyright law to add for the first time a right of public performance of protected works. Yet Congress took this major step in increments and applied it only to certain dramatic works, apparently on the presumption that performance rights were a critical source of revenue for those products. Congress also recognizing that nondramatic works had the greater potential of making sales of copies, so performance rights were not necessarily critical. Under this law, performances of nondramatic works—whether for educational or commercial purposes—were apparently unlawful.

In 1909, Congress extended the performance right again. This time the right would for the first time encompass nondramatic works, but only in a for-profit context. Nonprofit uses of nondramatic works were permissible after 1909, as they were before. Because the rights of copyright owners simply did not cover nonprofit performances of nondramatic uses, an exemption for nonprofit education was unnecessary. Performances of dramatic works, by contrast, remained unlawful, and the 1909 Act included no special relief for the benefit of education.

The 1976 Revision Act shifted once again the basic construct of rights and limitations. Effective January 1, 1978, the rights of copyright owners were redefined to apply the public-performance right to a broad range of materials—both dramatic and nondramatic—this time without excluding nonprofit uses. Thus, to preserve nonprofit performances, Congress needed to enact an exception or limitation on the rights of the copyright owner—much like the fair-use statute Congress eventually enacted. With passage of the full revision of the Copyright Act in 1976, Congress accordingly included in Section 110 a roster of “limitations” on the rights of the copyright owner, and most of Section 110 focuses on activities that might otherwise be unlawful “public performances.”

Section 110 is a detailed enumeration of rights, clearly reflecting the interests of specific groups and organizations that Congress was choosing to benefit by not giving copyright owners
the right to control the performances of some works by members of those groups. Many applications of Section 110 specifically encompass only performances of nondramatic works, evincing a congressional intent to continue the previous dichotomy between broadly protecting the performance rights for dramatic works, while allowing performances of nondramatic works at least selectively. The one provision allows, for example, performances of religious music in churches and nondramatic music in stores that sell records or compact disks, as well as performances of nondramatic music at horticultural events and at fraternal organizations. Educators were also participants in the drafting of Section 110, and the first two subsections allow limited performance and display rights in the face-to-face classroom environment and in the context of “transmissions” for distance education.

Contemporary distance education often uses many different technologies, but all forms and varieties have potential for infringing copyright. A fundamental premise of copyright law is that it grants to the copyright owner a set of exclusive rights associated with each owned work. The copyright owner has these rights: the right to reproduce the work in copies, the right to distribute copies of the work to the public, the right to make derivative works, and the right to make public performances and public displays of the work. In addition, an amendment to the Copyright Act in 1990 granted a set of “moral rights” for certain “works of visual art.” In 1998, Congress gave copyright owners a right to provide “technological protection systems” the effectively restrict access to copyrighted materials and at the same time gave copyright owners a cause of action to prevent the removal of “copyright management information” from a work.

Of all the newly added rights of the copyright owner, one added in 1995 has proved to have profound importance for distance education. With that amendment, Congress extended in a limited manner the public performance right to the copyright owner of a sound recording. Prior to 1995, the copyright owner of a sound recording was denied all performance rights, but the performance rights did extend to the author or composer of the underlying work captured on the recording. For example, when a recording of a musical work was publicly performed on the radio, only the composer had any rights and received all royalties. In 1995, Congress granted the performance rights to the copyright owner of the sound recording—typically the performer whose voice or other activities are captured on tape—but only in the context of “digital audio transmissions” of that recording. Moreover, before February 15, 1972, sound recordings were not protected at all under federal copyright law, and none of the rights of a copyright owner applied.

When an instructor wants to use copyright protected content on a website for distance education, that simple and essential activity can potentially implicate all of the rights of the copyright owner. Making the work available on the web server ordinarily involves an initial copy or reproduction of the work. Each time a student or other user accesses that server and that work, the server makes further digital copies. This server then distributes those copies electronically to the users in order to make them usable at the user’s computer. The conversion of the work initially from one medium to a digital format for markup and access on a web server arguably raises the potential of a derivative work. The accessibility of the work at individual computer terminals can, under the definitions in the Copyright Act, constitute a public display or a public performance.
The ease of committing potential infringement escalates as distance education grows in volume and complexity. Educational institutions within states or larger regions are combining to use technologies for sharing courses. Transmissions that originate at one location reach innumerable sites. Asynchronous systems allow students to access content at their choice of location or time schedule. Computer networks for delivery of instructional content enable students to download, print, copy, and possibly further transmit the materials to others in the class or perhaps to anyone anywhere at any time.

With such resounding potential for copyright infringement, the exceptions to the rights of the copyright owner become increasingly important. Best known among those exceptions is “fair use.” Fair use is well known among educators and copyright experts as a broad and flexible statute but one with little definition and no specific assurance of its scope or meaning. Whether something is or is not fair use depends, according to the statute, on a consideration of four factors: the purpose of the use; the nature of the copyrighted work used; the amount and substantiality of the use; and the effect of the use on the value of or potential market for the original work.

Needless to say, the fair-use statute does not give any specific answers to questions about the uses of works in distance education or for any other particular activity. Congress first enacted a fair-use statute in 1976, and at the same time also enacted a series of other statutory exceptions that are highly specific and do give focused answers to many particular situations. In Section 110(2) Congress addressed the question of displays and performances of copyrighted works in transmissions for educational purposes.

III. The Meaning and Problems of Section 110(2)

The copyright law specifically applicable to distance education is set forth in Section 110(2) of the U.S. Copyright Act, which fundamentally allows, under rigorous conditions, the ability to make displays and performances of some protected works in “transmissions” for educational purposes. Like most of the statutory limitations on the rights of copyright owners, this provision is highly specific and narrow in scope. It is also the product of negotiation and compromise, and it embodies concepts of historical significance that ultimately make little sense for contemporary distance education.

A. Displays and Performances

The activities permitted under Section 110(2) are limited to “displays” and “performances” of copyrighted works, and the other rights of copyright owners remain unaffected by this law. The Copyright Act defines “display” as follows:

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images.
nonsequentially.\textsuperscript{50}

In the context of education, common displays would include showing static images as part of the educational experience. Those images might be photographs, works of art, charts, graphs, printed text, or architectural or anatomical models.

The Copyright Act also defines “performance”:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.\textsuperscript{51}

Common performances in the educational setting might involve showing a film or video, playing a sound recording of music, playing music on instruments, acting a play, reciting poetry, or simply reading text aloud.

Even if the limitations of Section 110(2) did not exist, these many different and common displays and performances would not necessarily be infringements. First, not all types of copyrighted works have the benefit of performance and display rights. In particular, Section 106 of the Copyright Act grants performance rights only to these works: “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works...”\textsuperscript{52} Congress has granted public performance rights with respect to sound recordings, but only in the context of “digital audio performances.” Consequently, a sound recording may still be performed in an analog transmission without the potential of infringing that copyright.\textsuperscript{53}

A performance or display is also infringing only if it is made “publicly.” A performance or display can be made public under four general circumstances: (1) at a place open to the public; (2) at a place “where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; (3) by transmission or communication to either of those places; or (4) transmission or communication to the public “by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”\textsuperscript{54}

The live, face-to-face classroom could arguably be a place open to the public. Even if the entrance is limited to enrolled students, the assembled students in any particular course are likely beyond the customary circle of family and friends. Similarly, when the performances and displays are transmitted to other locations in the name of distance education, they may also be received by similar groups of students constituting the “public.” Moreover, in the case of a transmission of the educational content, received by students at their own time and place as distance education, the activity can be “public” even though the students are receiving the content in “separate places” and “at different times.”

Most displays and performances of protected works in education are likely to be made publicly and are likely to be of works that are subject to the performance and display rights.
Thus, the benefits of Section 110 become exceedingly important for furthering education and avoiding the serious consequences of infringement. The need for a specific exemption is especially important in light of the ambiguity of fair use.

B. Face-to-Face Teaching under Section 110(1)

The rigors and conditions of Section 110(2) can best be appreciated by comparing the law for distance education to the law applicable to displays and performances of works in the traditional, face-to-face classroom. Under Section 110(1) of the Copyright Act, nearly all displays and performances are allowed in face-to-face teaching. This statute allows almost any performance or display in the nonprofit educational context, when the activities are in a classroom or other similar location.

The concept of “face-to-face” is vital for distinguishing Section 110(1) from Section 110(2). One statute allows uses in “face-to-face” teaching, and the other statute is triggered when the uses are in “transmissions.” One statute may be described as liberal or open-ended in its scope, while the other is comparatively confined and even impossibly unworkable for many educational needs. The delineation between face-to-face and transmission determines which statute applies to any given situation.

Apparently “face-to-face” does not have to be read literally. The report from the House of Representatives, which accompanied passage of the 1976 Act, states:

The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase “in the course of face-to-face teaching activities” is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images.

This explanation poses many challenges for understanding the scope of Section 110(1). In excluding broadcasts that originate outside the educational institution, the House Report suggests that the central problem the statute addresses is the action of independent broadcasters who might compete with the college or university and offer instructional programs to multiple institutions. This excerpt from the report admonishes outside broadcasts, but makes no mention of transmissions emanating from the educational institution. The report then suggests that educators may well “transmit” works, but extends “face-to-face” to situations that may well be within the statutory definition of “transmission.”

The code defines “transmit” to mean a communication of a performance or display “by any device or process whereby images or sounds are received beyond the place from which they are sent.” A communication even at close range—down the hall to another room, or across
campus to another building—could easily be argued as a “transmission” to another location. Notwithstanding the potential to call it a “transmission,” the House Report suggests that educators can display and perform works through some closed-circuit system that delivers them to other locations on the same campus—a common need for popular classes, where all students are unable to meet in one room. That capability is crucial for campuses that lack large auditoriums for basic and popular courses. This explanation also suggests that a “transmission” for purposes of Section 110(2) occurs fundamentally when the content of the course is received beyond the boundaries of a campus.\(^{59}\)

C. Transmissions under Section 110(2)

Whatever the definition or scope, once the performance or display moves from the context of “face-to-face” teaching to “transmission,” Section 110(2) adds rigorous conditions that far outstrip the simple provisions of the preceding code section.\(^{60}\) The most problematic example of Section 110(2)’s narrowness is its allowance of performances only of “nondramatic literary or musical” works. Displays of works are not similarly limited. Consequently, an instructor may display any work, but performances may only be made of nondramatic works, such as readings from textbooks or novels or performing popular or symphonic music. The limitation to “nondramatic” works prevents the instructor from making performances of “dramatic” works that are allowed in face-to-face education, such as readings from plays or performances of opera, ballet, or Broadway stage musical works.\(^{61}\) This provision is a continuation of a dichotomy rooted in legislation from 1856.\(^{62}\)

Less directly, Section 110(2) also does not allow two broad categories of works from being performed in distance education. First, in its listing of permitted works, the statute specifically allows nondramatic musical works, but sound recordings are a distinct copyrightable work, and they are not mentioned. At the time of the enactment of Section 110(2) in 1976, sound recordings were protectable by copyright, but the copyright owner of sound recordings did not have public performance rights.\(^{63}\) Therefore, sound recordings did not need to be listed in Section 110(2) in 1976, because no limitation was needed when no right existed. With the addition of performance rights for digital sound recordings, however, digital transmissions for distance education that include sound recordings could be infringement.\(^{64}\)

A second broad category of works not permitted under Section 110(2) comprises all audiovisual works, from filmstrips to motion pictures. While audiovisual works are not mentioned in that code section, “literary works” are listed, and the Copyright Act defines “literary work” in part as a work “other than a motion picture or other audiovisual work.”\(^{65}\) Consequently, as one part of the law allows nondramatic literary works in distance education, another part of the law uses a definition to exclude an entire category of works. Unlike the omission of sound recordings, these works are excluded regardless of whether the transmission is digital or analog. The omission of audiovisual materials under Section 110(2) is complete, whether they are dramatic or nondramatic, whether they are commercially viable or have little market potential, whether they are educational in nature or feature-release films, and whether the instructor uses the entire film or just a portion of it.
To draw a line between allowed and disallowed works in the educational context has subtle, but profound, consequences. Many other provisions of copyright law make similarly abrupt distinctions among works, but most of those provisions apply to commercial enterprises that have the ability to study applicable law and build a business plan within the given parameters. If the music industry has the benefit of a “compulsory license” only with respect to nondramatic works, then a firm can engage in the business of exercising that license only as applied to nondramatic works, and negotiate an independent license for dramatic works. If the business planner can see advantages and profits within the law, then the business can move forward. By contrast, an educator ordinarily has little or no access to legal advice for instructional planning, and the decision to play a piece of music or to show a video clip does not ordinarily even hint of legal concerns among many educators, and an institutional decision to monitor the materials used in teaching would likely raise serious concerns about free speech and academic freedom. Quite simply, a legal structure that may well work in commercial enterprise may have little ability to succeed in the academic setting.

D. Conditions to Using Section 110(2)

The limitation on the types of works allowed in distance education may be the most prominent difficulty with the statute, but Section 110(2), subparts (A) through (C), sets forth requirements for enjoying even the limited benefits of the statute, and the current growth of web-based distance learning will encounter severe problems with complying.

Subsection (C)(i) requires that the transmission be “primarily” for “reception in classrooms or similar places normally devoted to instruction. . . .”67 Closed-circuit systems that transmit to a classroom or other facility set aside for instruction should be able to meet this condition, but instructional programs delivered on the Internet are often intended to reach students wherever they may be located—whether at home or at work or elsewhere.68

If an institution is unable to meet the requirement of Subsection (C)(i), it may in the alternative comply with Subsection (C)(ii), which requires that the transmission be “primarily” for students who are unable to attend in the classroom because of their “disabilities or other special circumstances.”69 Again, this provision may not be the open authority to deliver distance education freely into homes and offices, but it does allow the college or university to single out students who may qualify to receive the transmission at other locations. Whether those students may qualify depends on their reason for not coming to classrooms. If the reason is simply for the ease and convenience of students, that may not be a “special circumstance.” If the reason is because students are unable—because of work, family obligations, or personal conditions—to attend class at the appointed time, then the program may well qualify under Section 110(2). The House Report endorses this view:

Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced
workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason.71

While the law provides some degree of flexibility to meet the changing circumstances of education, the conditions to applying Section 110(2) pose serious obstacles for educators seeking to receive the benefits of the law in furtherance of their teaching plans.72

E. Beyond Displays and Performances: Making Copies

An overall difficulty of applying either Section 110(1) or 110(2) to the needs of education is that neither section permits the making of any copies whatsoever. While making copies for classroom use has generally been the subject of fair use, and not Section 110, copies are often necessary to effectuate the display or performance. Start with the simplest example. Under 110(1), an instructor can make a display of a work in a classroom, but often the instructor will need a copy of the image, text, chart, or other work onto a transparency. The display is clearly permissible, but the instructor is at best left to apply the vagaries of fair use to justify making the single copy.

The need for copies increases as distance education expands into Internet delivery. The Internet has been described as a rapid and large-scale “reproducing machine.”73 Distance educators speak of “synchronous” and “asynchronous” delivery, and fundamentally asynchronous delivery usually necessitates making a copy of the content available resident on a server or other system where students may access them at their own time and pace. Synchronous delivery is most often transmitted in real time, with live performances and displays, and a copy need not always be made and stored at the place of original transmission. At the outset, therefore, asynchronous delivery usually calls for at least one copy to be made and placed on the server.

Whether the delivery is asynchronous or synchronous, however, the process of transmitting content through the Internet involves a flourishing and proliferating sequence of reproductions. The communication system of the Internet makes copies of works at nodes across the country and around the world. Recipients of the transmission, for example through access of a website, are automatically making copies of the content into the memory of the local computer, even without keystroking commands to save or download. Investigators can also tell of supposedly deleted email that is found in backup systems on multiple servers. Copying is one of the central and necessary processes of the Internet. While the process of making a performance or display is sometimes allowed under Section 110(2), none of these copies is specifically allowed under that law.74 Educators and students are left again to fair use under Section 107 to
possibly sanction the reproductions.\footnote{55}

One specific type of copy is allowed under current law as an adjunct to distance education. Most educational institutions often want copies of transmissions for use by students who missed a class and by faculty who want to review and improve their teaching methods. Sometimes those copies are also used for further transmission by the originating institution, and by other organizations that also qualify for the Section 110(2) opportunities. Section 112(b) of the Copyright Act expressly allows a nonprofit institution that makes a transmission containing a display or performance allowed under 110(2) to make no more than thirty copies of such transmission, if: (1) no further copies are made from those copies, and (2) those copies are destroyed within seven years after the date of the first transmission, except one copy may be preserved for archival purposes.\footnote{56} Clearly, Section 112(b), like Section 110(2), was written in 1976 at a time when television transmission was the main delivery mode, and copies onto videotape were scarce and easily monitored and controlled by the institution.

While Section 112(b) is important when it is applicable, it is inherently limited. It only grants rights to the institution to make and keep copies; it does not grant rights to students to make or download copies, and it does not specify any right to distribute those copies to students or other institutions or any other recipient.\footnote{57} This provision also applies only to transmissions that comply with Section 110(2). For example, if the transmission includes only displays of works or performances of nondramatic literary or musical works, then Section 112(b) may apply. If other copyrighted works are included in the transmission, then the institution must either excise them before making or keeping the copies, or seek permission, or turn to fair use.

F. The Need for Change

The preceding summary of current law for distance education evidences many reasons why the law fails to have any practical meaning for current Internet delivery systems and the realities of educational decisionmaking. Clearly, the law bears little relationship to the necessities of distance learning through digital technologies, where students may access works at diverse locations other than a “classroom,” and where the transmission necessarily involves some incidental copies in order to make the display or performance of a work possible.\footnote{58} Moreover, the disallowance of whole categories of works forces illogical barriers on the advancement of learning. Indeed, one can make the case that Section 110(2) has been of limited applicability and has made little sense even in the context of television-based transmissions of 1976. One test of the law’s overall lack of acceptance has been the lack of legal action initiated under this code section since 1976, and the general lack of awareness of the law among educators and administrators who are ostensibly responsible for adherence to it.

Section 110(2) has been a phantom statute ever since its passage in 1976. No reported court cases give significant attention to its provisions, and no ruling is based on it terms. Few manuals and handbooks on the subject of copyright law for educators give significant attention to the statute.\footnote{59} In fact, at least one manual specifically on the issue of the use of copyrighted works in distance education gives detailed attention to the factors under fair-use law, but only obliquely
mentions concepts from Section 110(2). The law simply has been overlooked and disregarded. Perhaps the language and structure of the statute itself is too convoluted for educators and other professionals not trained in the law. Perhaps any law regulating displays and performances in the educational setting is intuitively not what educators expect. Perhaps this particular statute always has been too arcane to have any reasonable meaning for modern education. Moreover, the lack of lawsuits also suggests that copyright owners have little awareness or understanding or the law, or have no realistic means of monitoring uses of works to enforce their legal rights.

While the code provision has lurked for years as something of a phantom, the growth of distance education—especially on the Internet—has provoked heightened awareness of the applicability of copyright and awareness in particular of the potential role of Section 110(2). With that awareness came growing concern about the clear problems with Section 110(2) and the difficulties of giving workable meaning to fair use under Section 107. The growth of Internet delivery also has brought three major changes in the relationship of education to copyright law. First, instructional activities are more easily observed and found by copyright owners. Activities that were once relatively privately concealed in the classroom are now on the World Wide Web, where copyright owners can send "crawlers" and other programs to find and report uses of protected works. Second, materials delivered digitally can be easily downloaded, uploaded, and further transmitted. The potential for abuse and proliferating copies is vastly simplified. Third, networked systems and educational programs are often overseen by administrators and staff who have the opportunity to monitor uses and give guidance on proper implementation of technology. That oversight often brings with it the capability of guiding or reviewing the lawful use of copyrighted works in instruction, in a manner that is often impossible or even prohibited in the traditional classroom setting.

These developments have only underscored the failure of Section 110(2) as a workable standard. These developments also have drawn attention to a statute that previously remained far out of sight and out of mind. In recent years, Section 110(2) has become the object of discussion and analysis among interested parties who previously gave it little or no attention. The problems with the law also reached Congress, and in October 1998 Congress charged the U.S. Copyright Office with the duty of studying the law and reporting back with recommendations for possibly revising the law to support the growth of digital technologies in distance education.

IV. Recommendations for Revision from the U.S. Copyright Office

In May 1999 the U.S. Copyright Office delivered to Congress a detailed report that addressed many of the difficult issues surrounding the use of copyrighted works in distance education. The Copyright Office also proposed revisions to the law that would achieve a more meaningful and workable balance between the rights of copyright owners and users, while promoting the continued growth of distance education using digital technologies. The Copyright Office report responds directly to the many serious problems with adapting existing law for distance education to modern technologies. The report is an ambitious study that surveys problems with existing law, identifies the underlying policies for striking a balance between
protecting the rights of copyright owners, and articulates suggested solutions that would allow educators to use works under limited circumstances.

The report makes important recommendations for revising the statute in response to the conditions of digital distance education.88 Most significantly, the recommendations would expand the scope of materials that may be used in distance education, notably by eliminating the current proscription of “dramatic” works and audiovisual works.89 On the other hand, the proposal would allow only “limited portions” of those works in a manner consistent with the “nature of the market for that type of work and the pedagogical purposes of the use.”90 For example, an instructor could use “the equivalent of a film clip, rather than a substantial part of the film.”91 The report declines to define the parameters of “portions,” and in any event many educators are likely to object to the constraint on teaching from the full work, while proprietors are certain to criticize the harm to potential sales of the works to the students.92

The Copyright Office would broadly allow the copying that is essential for accomplishing Internet delivery of instruction, such as the necessary intermediate copying, and placing the materials on a server for student access during the academic term when the course is offered.93 The report also makes clear that the content should be transmitted to locations far beyond the traditional classroom or similar locations, as the current law provides.94 The Copyright Office has recommended that Congress allow educators to transmit the content of distance-education courses to enrolled students, regardless of their physical location.95

These recommendations are built around a vision of instructors making displays and performances in the context of “mediated instruction.”96 In particular, the Copyright Office identified concerns with the prospect of “electronic reserves” or other arrangements whereby entire works are made available for students to access at their discretion, thus potentially substituting for sales of those works.97 To facilitate uses of works for educational purposes, however, the report recommends that works be used in a context where the instructor is illustrating a point or where the use is an integral part of a course structure.98 In this context, the “portion limits” may not always be onerous; in customary instruction, a faculty member might usually use only excerpts of a work, offering analysis or class discussion to accompany it.

Instructors who reap the benefits of the expanded right of use must also assume some responsibilities for limiting the risks to the copyright owners. First, the transient copies that result from the digital transmission may be retained only as needed to complete the transmission.99 Instructors will need to review and delete save files periodically. Second, the institution would need to develop policies that describe copyright law and must provide those policies to students, faculty, and others.100 Third, the transmission to students must include a notice that the content of the transmission may be subject to copyright protection.101 Fourth, the institution would be required to implement technological protections that reasonably prevent unauthorized access and further dissemination of the material.102

Perhaps the most troubling limitation on teaching appears in a footnote near the end of the report. The report is offering details for amending Section 112 to specifically permit
instructors to “upload a copyrighted work onto a server” in order to facilitate a transmission, when this footnote pointedly appears to dampen all improvements proposed in the report:

The limitation that the work whose performance or display is transmitted must be in digital form is intended to ensure that the exemption does not itself authorize digitizing a work in analog form. Such authorization must be obtained from the copyright owner, or found in another provision of the law such as fair use.103

The Copyright Office is making a most important point in a cryptic and remote mention that copyrighted works may be used in digital distance education, but only if they are already available in digital format. If the Copyright Office is suggesting that analog images, text, and sound cannot be digitized for transmission—even within the parameters of limited access, portion limits, and mediated instruction—the report has introduced a severe and perhaps insurmountable circumscription on the scope of works that may be made available for teaching and learning.

V. Policies Underlying the Law and the Proposals for Revision

Any study of policy supporting a specific law or proposed law must begin with two policy perspectives: the general policy underlying the law, and the specific policy behind the individual provision in question. Fortunately, in the case of copyright and the law for distance education, the record offers considerable evidence to identify and understand those policies.

A. The Policies of U.S. Copyright Law

The underlying purposes, objectives, and justifications for copyright law begin with the U.S. Constitution which grants to Congress the power to make copyright law, and patent law, but does so with a stated social objective:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.104

To fulfill that constitutional objective, copyright law in the United States has developed around a long-standing policy that the law should serve simultaneously two competing and sometimes conflicting purposes.105 The law establishes a set of rights that belong initially to the creator of works, and the law limits that set of rights by allowing to the public the right to make certain limited uses of the work.106 The law serves the public interest in other ways as well, such as by providing for the expiration of copyrights after a period of years and by not extending copyright protection to several broad classes of works that are deemed to be better left without protection.107
B. Policy Foundations of the U.S. Copyright Office Report

In its report from May 1999 the U.S. Copyright Office provided elaborate explanations and justifications for its recommendations.\(^{108}\) This article will identify and explain many of them, but central to the report’s position is a stated belief that the recommendations may well effect meaningful changes in the law, but without changing the policies that justify the current law with all if its conditions and restrictions. One key statement tells much:

Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods. In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.\(^{109}\)

According to the Copyright Office, the law has become obsolete, but the policy for it has not. The law needs to be changed to preserve and continue that policy. Implicit in such a statement is that the policy behind the new proposal and behind the existing law can in fact be identified and compared, and that one will find a similarity or even identity of supporting policy. What is that policy underlying Section 110(2)? The Copyright Office report offers some insight:

The exemptions in section 110(1) and (2) embody a policy determination that certain uses of copyrighted works in connection with instruction should be permitted without the need to obtain a license or rely on fair use. In 1976, with the current Copyright Act was enacted, Congress expressed the intent to cover in these two sections together “all of the various methods by which performances or displays in the course of systematic instruction take place.” As explained [earlier in the report], the technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery method for systematic instruction. Without an amendment to accommodate these new technologies, the policy behind the law will be increasingly diminished.\(^{110}\)

While the report does not take a detailed look at the past, it does offer many detailed points of policy and principle to justify the proposed changes. If the policies from the past are carried forward in the proposed changes, then the Copyright Office’s articulation of justifications for new law must be the same policies that supported the enactment of the existing Section 110(2) in 1976. This article will compare the policy statements made in 1999 to the statements made as the 1976 legislation moved toward passage.

The Copyright Office report includes many statements of principles to support its recommendations. Those principles evidence a choice of position that the Copyright Office is adopting from among a range of alternatives.\(^{111}\) Indeed, if the Copyright Office were to simply expound that “education is good” in support of an exception for distance education, that statement would evidence a choice of other labels—“bad,” “mediocre,” “divine”—that one could
attribute to education. While the report’s statements are seldom so pedestrian and never so facetious, the report is rich with supporting statements that demonstrate a value judgement or policy position.

This section of the article will identify those policy statements and group them under general headings that provide insight into policy that is shaping decisions within a federal agency and that may shape a revision of the statute should Congress act on the report.\textsuperscript{112}

Policy: \textit{The law should enable the use of technology in furtherance of social good.}

The Copyright Office clearly endorsed the social merits of encouraging distance education and sympathized with the motivations that draw students to such programs. These statements from the report capture that sentiment:

Many students drawn to distance education are professionals whose jobs prevent them from attending classes on a campus.\textsuperscript{113}

Retirees often take advantage of distance education opportunities as well. Greater disposable income and/or greater leisure may lead older students to take courses for life-enhancing reasons, rather than for academic or professional advancement. Senior citizens may choose to take courses online due to restricted mobility or a desire to study privately.\textsuperscript{114}

Once accepting the social merits of distance education, the report extends the concept of social good by finding it in the application of the law itself: “[P]rimary goals [of education and library groups] are to avoid discrimination against remote site students. . .”\textsuperscript{115}

In making that statement, the Copyright Office is firmly advancing not only a positive perception of distance education, but also a positive perception of the role of the law to advance distance education. The Copyright Office could easily have adopted a neutral position on the merits of distance education. Without determining whether distance education was either a worthy or disdainful pursuit, the Copyright Office report might have proceeded to find no particular role for the law in advancing it. Instead, the Copyright Office chose to be supportive of both the quest and the function of government to advance distance education.

Policy: \textit{The law can compensate for difficulties in the effort to obtain licenses efficiently and economically.}

Licensing of copyrighted works for use in distance education was a major issue in the consideration of an exemption.\textsuperscript{116} If licensing were to function efficiently and economically, an exemption may not be necessary. If licenses were successfully made between copyright owners and educators, the Copyright Office might conclude that the marketplace is operating well and needs no adjustment through an act of Congress. Instead, the report notes the frequent inability of educators to successfully secure licenses and to secure them at reasonable prices. “Success”
and "reasonable" are evaluative terms that alone reflect a choice by the Copyright Office about its view of the marketplace and experiences with distance education and licensing. The report gives extensive review of the problems with licensing and concludes:

These problems [with licensing] can be broken down into three categories: difficulty locating the copyright owner; inability to obtain a timely response; and unreasonable prices or other terms.\textsuperscript{117}

Likewise, with the growing emphasis on multimedia works in distance education, copyright owners such as educational publishers are incorporating more, and more varied, preexisting works, increasing their need to license content from disparate sources.\textsuperscript{118}

Each point in that statement reflects a choice from among possible conclusions. First, copyright owners are often not easy to locate. Copyrights may be bought and sold, publishers go out of business, the authors pass their copyrights to heirs with no mention of copyrights in a will or probate proceeding. "Difficult" is a relative term, and copyright owners can be equally difficult to find in connection with any project, not merely distance education. Second, copyright owners sometimes give quick responses to requests for permission, severely delayed responses, or no response at all. Again, distance education is not unique in facing these circumstances, and what may seem to be a severely delayed response to an educator waiting to make teaching plans may be a duly completed task to an overworked secretary at a small publishing house. Copyright owners also have no legal duty to reply at all to requests for permission; in some respects the Copyright Office is building the justification for an exemption on the failure of copyright owners to fulfill a duty they do not have under the law. Third, copyright owners in general have the right not to license their works, or to impose fees without limitation in exchange for the grant of a license. The law imposes no requirement of "reasonableness" on fees, and any determination of reasonableness is an imposition of a value system to attribute acceptability or tolerability on prices, and by implication identify prices that are not acceptable.

A willingness of the Copyright Office to acknowledge problems with licensing and to critique copyright owners in terms of efficiency and economics is to adopt a policy position.\textsuperscript{119} The Copyright Office could have chose rationally to declare that copyright owners have the right to charge any fee and to delay response or not respond at all; the Copyright Office could also have considered the testimony of educators and found that their experiences with licensing were within the bounds of "reasonableness" or perhaps similar to other experiences with licensing and therefore not demanding a resolution that is distinctive to distance education. Instead, the Copyright Office assumed a critical position and chose to characterize the evidence in such a manner that it manifested a problem, and the Copyright Office accepted the policy that the problem is one that Congress should address through legislating a revised exception to the rights of copyright owners.

Policy: \textit{The law should adapt to meet the practical realities of education.}
The fundamental purpose of copyright is to promote the progress of science and the useful arts, and Congress attempts to fulfill that purpose by granting rights to owners and balancing those rights with exceptions that are exercisable by the public. The history of fair use and other rights to use copyrighted materials is built on a practical application of the law to achieve a pragmatic result. Defendants asserting fair use in court cases generally have not sought to exercise the law for its own sake, but rather have used to law to define a course of conduct that serves some practical objective. Kinko's made coursepacks to exploit a business opportunity, Detroit Public Television used a clip of music to make a meaningful and appealing video production.

The Copyright Office report similarly notes the practical necessities of some copying and transmission in order to accomplish desired outcomes of distance education:

In its current form, section 110(2) limits the location to which transmissions may be sent: they must be made primarily to a classroom or similar place normally devoted to instruction; to persons whose disabilities or other special circumstances prevent classroom attendance; or to government employees. The nature of digital distance education makes this limitation conceptually and practically obsolete. The fundamental goal is to permit instruction to take place anywhere. Remote site students may access instructional materials wherever they can use a computer—from their homes, from the workplace, or from a library. Eliminating the physical classroom limitation would better reflect today's realities.

This proposed amendment would not constitute an extreme expansion in the coverage of the exemption. The statute already accommodates the needs of students who cannot attend a physical classroom because of "special circumstances" other than disabilities. The legislative history makes clear that Congress envisaged the term "special circumstances" to include those "who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason." The amendment would add those students who are able to attend classes, but prefer to learn at a time and place of their own choosing.

This language, with its emphasis on "realities" and "choosing," manifests an extraordinarily blunt decision by the Copyright Office that the law should serve pragmatic outcomes. Many of the other policy statements in the report center on policies that are intrinsic to the law itself, such as the need to balance rights of ownership and rights of use, or the need for the law to compensate for limitations and barriers in the marketplace. These policy statements, by contrast, are a proposition that the law be revised to meet the needs of users, and even the preferences and choices of users.

Policy: Exemptions Should Counter Expanded Legal Protections for Owners
Copyright law is at its core a quest for a balance between the rights of copyright owners and the users. Fundamentally, the law grants rights to users in Section 106, but the law then tempers those rights with limitations and exceptions in Sections 107 to 121. The Copyright Act has manifested that basic structure since its earliest enactment, and it became especially well established with the revision of the full code in 1976. Amendments to the Act since 1976 often have evidenced a continuation of the policy of balance. On the other hand, many amendments to the copyright since 1976 have expanded the rights of copyright owners, but at no time has Congress revised Section 110(2) to offer a concomitant expansion of rights to the public.

Indeed, many of the new rights of copyright owners directly undercut some of the intended applications of the law. In particular, in 1995 Congress amended Section 106 to grant to copyright owners of sound recordings a right of public performance of those works in the context of a "digital audio transmission." Congress also amended Section 114 to elaborate on the limited application of the new right. For the first time, however, sound recordings had performance rights, and that right could easily apply to transmissions of music, spoken word, and other recordings as they may be used in web-based or other digital distance education. Consequently, from 1978 to 1995, sound recordings could be transmitted in distance education without infringing on the owner’s rights. Beginning in 1995, however, sound recordings gained limited performance rights, thus creating new and perhaps unintended barriers to distance education. The Copyright Office report notes this situation:

When section 110(2) was enacted in 1976, there was no public performance right for sound recordings. Educators were therefore free to transmit performances of sound recordings to students without restriction (assuming that the use of any literary or musical work embodied in the sound recording was authorized by statute or license). It was not until 1996 that owners of sound recordings were granted an exclusive public performance right, limited to certain digital audio transmissions. At that time, there was no discussion of whether sound recordings should be added to the coverage of section 110(2).

The failure to include sound recording in the scope of current section 110(2) does result in a discrepancy between a distance educator’s ability to perform nondramatic musical works and her ability to perform the sound recording in which it is embodied. In other words, the copyright owner of the music is essentially subsidizing some distance education activities, while the record producer remains free to charge for the same activities. One question is whether this makes sense, when typically a teacher will perform a musical work by playing a sound recording, rather than by a live performance.

An another example of adjusting the balance, the Digital Millennium Copyright Act of 1998 greatly expanded the rights of copyright owners by creating new forms of legal violations that can arise when one circumvents technological protection systems and when a user removes “copyright management information.” These new rights are especially intended to give important reassurance to copyright owners seeking to make works available in a digital
environment, where works may be easily copied, disseminated, and altered. Technological protection systems, for example, can also be deployed to limit access to materials on a distance-education website, and the law can also give some assurance that unauthorized access or other abuses can lead to civil or even criminal action. The Copyright Office once again noted that these expanding rights of owners can be used to grant a correspondingly greater grant of rights to users.\textsuperscript{136}

Technological protection measures [under the DMCA], as they continue to develop and enter into widespread use, are likely to make copyright owners more comfortable with licensing digital uses.\textsuperscript{137}

These provisions [of the DMCA] should assist in lessening some of the risks involved in digital distance education.\textsuperscript{138}

In this context, the Copyright Office report notes that distance-education systems can be deployed with appropriate limits on access and use both to create the technological protection systems that the DMCA secures, and simply to create practical barriers to the misuse of the copyrighted works: "It is therefore critical, if section 110(2) is expanded to cover digital transmissions, that safeguards be incorporated into the statute to minimize these risks."\textsuperscript{139}

Policy: New Exemptions Should be Created When Existing Exemptions Fail

Congress has created numerous specific limitations on the rights of copyright owners, but Congress nevertheless is reluctant to inflate the code with new provisions if current language can serve the purpose.\textsuperscript{140} The fair-use statute has nearly unlimited potential for interpretation and application to a wide variety of unpredictable situations. Fair use can also be construed narrowly or broadly, and regardless of one’s approach to the law it invariably creates some confusion and poses some limits.\textsuperscript{141} Nevertheless, fair use has continued to serve as a recourse for possibly allowing activities that do not fit the parameters of a more specific right of use, such as Section 110(2).\textsuperscript{142}

The Copyright Office noted in its report that fair use was proving to be an unsatisfying recourse for addressing needs that were outside the boundaries of Section 110(2):

It also became apparent during the course of the hearings and comment process that a number of misunderstandings cloud the public’s conception of fair use. Most fundamental is a lack of awareness that fair use in its current form does apply in the digital environment, or that it does not exempt all nonprofit educational uses. In addition, a number of commentators evinced confusion about the relationship between the fair use doctrine the specific exemptions in section 110. It was not clear to all that these are separate defenses, with fair use claims able to be asserted for conduct that does not fall within the detailed conditions of section 110.\textsuperscript{143}
The Copyright Office also noted that fair use has been a persistent source of confusion, and recent efforts to develop guidelines that interpret the law as applied to distance education largely have failed.\textsuperscript{144}

Similar confusion occurred with regard to the meaning and effect of fair use guidelines. Some seem to interpret the absence of formally established guidelines dealing with the application of fair use in the digital environment as having a negative implication about the availability of fair use as a defense, or to believe that guidelines define the outer limits of permissible conduct.\textsuperscript{145}

Ultimately, the entire process [of developing fair use guidelines] became controversial, . . . [in part] because of conflicting views of the value and function of fair use guidelines generally. . . .\textsuperscript{146}

Consequently, the Copyright Office found that Section 107 has failed to address adequately the needs of distance education and accordingly has given rise to the need to enhance the narrow language of Section 110(2).\textsuperscript{147}

Policy: Exemptions Should Recognize that Technology can Offer Solutions

The Copyright Office report looks optimistically to the ability of the technology that creates the problem to solve the problem as well. Just as digital networks can facilitate the rapid duplication and dissemination of works, so can encoding create restrictions on access and limits on duplication: “Technology can protect copyrighted works in many ways. It can restrict access to the work, restrict uses of the work and identify the terms and conditions of using the work. In some circumstances it can also find copies of the work on the World Wide Web and report their existence to the copyright owner, who can determine whether the copy is authorized. While there is a substantial degree of overlap in these technologies, they can be separated into technologies that limit access to the works, and technologies that prevent or detect uses of works after access.”\textsuperscript{148}

The report looks optimistically to the prospect that effective technological systems will be available in the near future:

With the ever-increasing ability to transmit huge amounts of material quickly and easily over computer networks, copyright owners and users in all sectors recognize the need to provide security for that material. Many technology companies and content-provider groups are working to develop technologies for protecting works in the digital environment that will be viable in the marketplace. Industries are also collaborating among themselves in an effort to develop broadly-based, effective technological standards.\textsuperscript{149}
Policy: Exemptions Should Encompass Activities that are Technologically Inevitable

The nature of digital technology is that reproduction and other potentially infringing activity is inevitable; the Copyright Office therefore notes the need to craft exceptions to the rights of copyright owners in order to allow the inevitabilities of technology. When distance education was conducted principally by television broadcast, the displays and performances could be carried live, and the content could be disseminated to students by means of the one original recording or other material object that the instructor might possess and control. Section 112(b) permits limited copying of the telecast of the instructional experience with the embodied performed or displayed copyrighted works. But nothing in Section 110(2) anticipates either the need to make a copy of a work in order to facilitate the transmission in the first place, or the copies that might arise as a passive and necessary consequence of the technology, or the copies that a student might make of the work for further study and review. Some of these activities may well be within fair use, but the Copyright Office also emphasized that fair use had largely failed to be used within the marketplace to give an enhanced meaning to Section 110(2).

The Copyright Office clearly wanted to permit the essential copying that the technology generates:

[D]igital transmission by definition involves multiple acts of reproduction, and often distribution, which are not covered by section 110(2). Therefore, even if the performance and display were exempted, these digital transmissions would result in an infringement unless the accompanying acts of reproduction and distribution were otherwise authorized.

Moreover, with the growth and easy availability of new technologies, teachers are simply able to engage in practices that were not feasible in the past:

In the years since online courses have become prevalent, faculty members have tended to create their own content without incorporating much third-party material. This may be in part because the technology used to create such courses has not in the past facilitated the inclusion of preexisting content. This situation is changing, as faculty become more technologically sophisticated, and more commercial software packages become available.

C. Policies Underlying Existing Section 110(2)

At the core of the Copyright Office report is the statement that the policies underlying its proposals for reform of the distance-education statute are consistent with the underlying policies of the current law. Those policies may be discerned from the legislative history leading to passage of the current Section 110(2). Congress enacted the current law in 1976, but much of the language of Section 110(2) took shape in draft bills that were the subject of hearings in 1964 and 1965. At that time the concept was labeled "educational broadcasting," and many
publishers and educators took a strong interest in the development of the law and its potential for allowing some uses of protected works.

Policy: Balance in the Law

Then, as now, the central policy of the law was to find a balance between rights of ownership and rights of use. Speaking at the hearings in 1965, the Deputy Register of Copyrights noted the need to create exceptions, and noted the limits of current exceptions. The Deputy Register summarized the 1909 Copyright Act, then in effect, explaining that the performance of a nondramatic work under the 1909 Act “by an educational or other nonprofit radio or television station . . . is not an infringement of copyright. . . .” Congress already had cleared the ability for educators to use at least nondramatic works, simply because the performance right extended only to dramatic works. Implicit in this point is the need to create a specific exception for education, if Congress were to expand the performance right in general to nondramatic works. As is often at the foundation of the law, grants of rights to owners are balanced by rights to the public. Congress eventually took exactly that step by expanding owners’ rights, and enacting Section 110(2) to create an educational exception. That exception, however, only applied to nondramatic works; it only specifically counterbalances the new right granted to owners, and it does not extend the rights of users to dramatic works.

The Deputy Register also noted that the 1909 Act does not specifically allow any right to make copies of the telecast: the making of ephemeral copies “is a right that is not granted in the present law and is thus an additional limitation on the author’s exclusivity.” The spokesperson for the Copyright Office was once again taking inventory of the current balance of rights and noting whether that balance might be tipped askew with each proposed piece of legislation. In the end, the Copyright Office supported a right to make a copy of the broadcast and to keep and use it for limited purposes, emphasizing that such a provision would be an expansion of rights of users over the 1909 Act. While proprietors were present to argue for tighter limits on uses of works, educators testified for broader rights of use. A bill that fully satisfies neither side might manifest the desired balance.

Policy: Exemptions Should Serve the Social Good

The hearings from 1965 are replete with statements about the importance of distance education and the need for the law to serve the social objectives of education. A spokesperson for the National Association of Educational Broadcasters criticized the requirement that the transmission be received only in classrooms and similar places, and he used words that echoed some of the testimony heard again in 1999: “The place-of-reception criterion in the bill for distinguishing between exempted and nonexempted educational uses of copyrighted materials is drawn upon what appears to be the arbitrary basis of where the message is received and fails to recognize the true purpose of the educational broadcaster. Such criterion . . . will result in shortsighted and unsupportable discrimination among people who have the greatest need for educational services through broadcasting.” Drafters of the statute in 1965, and drafters of the
report in 1999, were looking to some of the same concerns: facilitating quality education, and reaching a variety of students in diverse locations, and preventing *discrimination* among those students by restricting the content and the educational experience that some of them will receive.\textsuperscript{167}

**Policy: Exemptions Should Compensate for the Impracticalities of Licenses**

Just as the 1999 report from the Copyright Office focused on the practical limitations of licenses, so did Congress hear some testimony before enactment of the 1976 Act about the travails of requiring educators to secure permissions for individual uses. A college administrator responsible for educational television services noted that without a specific exemption for the benefit of nonprofit performances, educators would be held to the same standard as commercial broadcasters: “College and university instructors, under these constraining conditions, would be unwilling to present radio or TV courses in modern literature, fine arts, etc.”\textsuperscript{168}

**Policy: Exemptions Should Accommodate Expanding and Inevitable Technology**

Naturally, not everyone supports the revision and expansion of the current law, and not everyone supported the law as originally drafted. Whatever the constraints and restrictions in the statute, it will invariably interfere with the interests of some copyright owners. That Congress chose to enact the legislation over such objections can also suggest the policies that Congress was seeking to uphold. A representative from the publishing industry, the American Textbook Publishers Institute, testified in 1965 against the bill that would allow the use of new technology—even television broadcasts—for distance education: “The proposed bill not only continues these [current] rights but appears to go much further. It appears to provide free use by educational institutions of copyrighted materials not only in the commonsense, traditional manner but by the use of machines.”\textsuperscript{169}

In the end, Congress chose to accommodate the growing use of those machines. Indeed, another publisher representative, from the American Book Publishers Council, noted the inevitable growth of distance education: “But nonprofit television is now becoming a major educational instrument reaching simultaneous audiences of hundreds of thousands. It is certain to grow.”\textsuperscript{170} A study from 1964 indicated “over 11½ million enrollments in televised courses.”\textsuperscript{171} Congress chose in the Copyright Revision Act of 1976 to accommodate the new technologies and not to interfere with their inevitable growth. Congress and the interested parties in the 1960s and 1970s likely never anticipated anything quite like the Internet and its vast potential for expanding distance education and posing added risks to copyright owners. Yet Congress responded then to the need to meet the inevitabilities of technology. The 1999 report from the Copyright Office asks Congress to do the same.\textsuperscript{172}

VI. Conclusion
The report from the U.S. Copyright Office on the subject of distance education is a most commendable accomplishment, especially in light of the complexity and contentiousness of the issues and the excruciatingly tight deadline that Congress imposed on the Copyright Office. On the surface, the report is a critical and insightful overview of current practices for distance education at educational institutions throughout the country. The report also underscores a series of constructive, and ultimately balanced, recommendations for revising existing Section 110(2) of the Copyright Act. In its depth of analysis, however, the report offers thoughtful and cogent articulations of policy in support of the recommendations.

At the center of the policy analysis underlying the Copyright Office recommendations is the statement that the policy justifications for revising the statute is a need to preserve the policies that supported the existing statute. The report seeks to create continuity of policy objectives, and it generally succeeds. A look back at copyright policy in general and at the policy justifications that Congress considered before enacting the current Section 110(2) reveals that in fact the 1999 report is in keeping with established policies and objectives. Most fundamental, the law has sought a balance between rights of owners and rights of users. The law also has sought to achieve socially desirable goals, such as education. The law also has adapted through the years to accommodate the inevitabilities of new technologies.

This policy analysis reveals much about Congress and the nature of statutory development. Copyright developments, each in its own incremental fashion, can respond to technological demands and realities. The statutes can accommodate new technologies, and lawmakers are often motivated to accomplish exactly that outcome. But Congress also seeks to integrate technology as a solution to the problem that technology engenders in the first place. Thus, just as technology unleashes a vast potential for infringement, so can innovations allow for controlling access and minimizing the risks of abuse of copyrighted works.

Perhaps most revealing in this study is that despite the ongoing revolution in technology and the rapid expansion of distance education, Congress continues to look for essentially the same elusive balance between the interests of securing rights to owners while simultaneously fostering the social benefits of education. That balance is a direct outgrowth of the constitutional principle that Congress has power to grant rights, but is to do so in furtherance of advancing knowledge and learning. Rights and limits in the law implement that ideal.

That balance is overtly pragmatic in its effect and in its creation. Quite bluntly, this study of the distance-education statute reveals that Congress has in the past, and likely will in the future, rely on interested parties to articulate positions, and Congress will identify a statutory construct that leaves divergent views equally satisfied and dissatisfied. Congress has the pragmatic duty of crafting a statute that manifests compromise, and that in the process it would ideally achieve something approximating the constitutional balance as well. Congress is clearly striving to address multiple policies in developing the law, but foremost is the quest for that balance between owners and users.

If Congress in fact has achieved that balance with regard to any aspect of copyright law, it has attained an extraordinary goal. In the context of conflicting lobbying efforts and powerful
interests bearing on the legislators, however, a true balance may be impossible to identify. Moreover, any balance is perceived as relative to the weight of counterbalancing views, and any position on distance education or any other copyright issue can always be recast as an ideal medium between two other possible positions. If the goal is to find a balanced application of the law, almost any statutory language can arguably be cast as balanced. Therefore, the difficult challenge of finding the proper scope of user rights for distance education must reflect on a complex host of underlying policy objectives, and not merely find justification as a balance between opposing interests.

1 “Distance education” may be defined broadly as the delivery of instructional content to students who are located at some geographical location—or at multiple locations—other than the place from which the delivery originates. The geographical distance between point of transmission and place of reception need not be great. See Lisa Guernsey, Distance Education for the Not-So-Distant, CHRON. HIGHER ED., Mar. 27, 1998, at A29-A30 (finding that many students enrolled in online courses are also enrolled in regular courses on campus). Thus, distance education may encompass television transmissions, websites, or even radio broadcasts. Critical to the concept for purposes of the copyright implications examined here is that the content is perceived by students through a display or performance of the work facilitated by instructor and not necessarily through the making of copies. This article will use the label “distance education” principally because it corresponds with the choice of terms in the 1999 report from the Copyright Office. Other labels that sometimes appear in the literature include “distance learning,” “distributed learning,” “online courses,” or “web-based delivery.” Early literature used terms that now seem anachronistic, such as “educational broadcasting” or even “correspondence courses.” See generally U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 9-10 (1999) [hereinafter DISTANCE EDUCATION REPORT] (“There is general consensus on the most fundamental definition: distance education is a form of education in which students are separated from their instructors by time and/or space.”). The report from the U.S. Copyright Office on distance education is available on the U.S. Copyright Office site at <http://lcweb.loc.gov/copyright/>.


3 For a general study of copyright law applicable to distance education, see Kenneth D. Salomon, A Primer on Distance Learning and Intellectual Property Issues 96 ED. L. REP. 305 (1995).

4 Fair use is codified in Section 107 of the U.S. Copyright Act, but it is only one of many statutory exceptions to the rights of owners. See 17 U.S.C. §§ 107-121. This article focuses primarily on Section 110(2).

5 Many publications survey numerous aspects of distance education, but seldom mention copyright issues. See, e.g., Janis H. Bruwelheide, Copyright: Opportunities and Restrictions for the Teleinstructor 71 NEW DIRECTIONS FOR TEACHING AND LEARNING 95 (1997) (surveying briefly the issue of fair use and Section 110 and concludes in part “Ask permission from copyright owners”); TOM CLARK AND DAVID ELSE, DISTANCE EDUCATION, ELECTRONIC NETWORKING, AND SCHOOL POLICY (1998) (surveys briefly various federal policy initiatives without mentioning copyright); GOING THE DISTANCE: A HANDBOOK FOR DEVELOPING DISTANCE DEGREE PROGRAMS USING TELEVISION COURSES AND TELECOMMUNICATIONS TECHNOLOGIES (1992) (examines the administrative issues surrounding the delivery of content, but does not mention copyright); GERALD C. VAN DUSEN, THE VIRTUAL CAMPUS: TECHNOLOGY AND REFORM IN HIGHER EDUCATION (1997) (advises educators about the need to stay abreast of federal communication regulations, but includes no mention of copyright); JOHN R. VERDUIN, JR. AND THOMAS A. CLARK, DISTANCE EDUCATION: THE FOUNDATIONS OF EFFECTIVE PRACTICE (1991) (no mention of copyright issues in the index).

8 The legal literature has given little analytical attention to Sections 110(1) and 110(2). See, e.g., Francis M. Nevins, COPYRIGHT, CASSETTES AND CLASSROOMS: THE PERFORMANCE PUZZLE 43 J. COPYRIGHT SOC'Y U.S.A. 1 (1995).
9 The Copyright Act includes this definition: “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101.
10 See infra text accompanying notes 78-85. For example, an early article summarized the significance of the new Copyright Act as applied to education, and it offered only two short, descriptive paragraphs about Section 110(2). See Don Lawrence Pitt, Comment, Education and the Copyright Law: Still and Open Issue 46 FORDHAM L. REV. 91, 108 (1977). See also Bernard Korman, Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act 22 N.Y.L.S. L. REV. 521, 525 (1977) (mentioning blithely that Sections 110(1) & (2) “are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place”).
11 DISTANCE EDUCATION REPORT, supra note 1.
12 See infra text accompanying notes 104-172.
13 See infra text accompanying notes 109-110.
16 In 1897 Congress extended the performance right to musical playscripts. Act of January 6, 1897, ch. 4, 28 Stat. 481.
17 See Bernard A. Grossman, CYCLES IN COPYRIGHT 22 N.Y.L.S. L. REV. 653, 664 (1977) (“The rationale seems to have been that performances were a tangible representation of a product of the mind which had been captured and made reproducible.”).
19 The extent of the exclusion of nonprofit uses was tested in the case of Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d. 852 (2d Cir.), cert. denied, 323 U.S. 766 (1944). The court ruled that a for-profit radio station that was operated by a nonprofit entity was not exempt from paying royalties for performance rights. See generally Note, Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights, 51 IOWA L. REV. 1049, 1053 (1966).
22 17 U.S.C. § 106 (“the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly. . .”).
23 Some critics of the legislation argued that Congress was not merely preserving the nonprofit performance right as allowed under the 1909 Act, because the use of television technology enabled performances to reach more viewers and have a more significant harmful consequence for copyright owners: “When the performance right ‘for profit’ was included in the copyright law with respect to nondramatic works, ‘nonprofit’ performance was generally face to face, largely in churches, classrooms, club meetings, etc. But nonprofit television is now becoming a major educational instrument, reaching simultaneous audiences of hundreds of thousands. It is certain to continue to grow.” U.S. HOUSE OF REPRESENTATIVES, COPYRIGHT LAW REVISION, DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 228 (Comm. Print 1963) (statement of American Book Publishers Council, Inc. and American Textbook Publishers Institute). See also Marian Halley, The Educator and the Copyright Law, in 17 COPYRIGHT LAW SYMPOSIUM 37 (1969) (noting the argument that nonprofit performances should be allowed only in the face-to-face context, but a right of use should not extend to distance education); Michael E. Meccas, The Effect of the Copyright Act and the Proposed Revision on Educators as Users of Copyrighted Materials in 15 COPYRIGHT LAW SYMPOSIUM 134 (1967) (summarizing the pending bills).
24 17 U.S.C. § 110 (“Notwithstanding the [rights of copyright owners], the following are not infringements of
Section 110 permits the display and performance of works as detailed in this article, but other subsections apply to churches, restaurants and taverns, agricultural and horticultural fairs, fraternal and veterans’ organizations, and transmissions to persons who are blind. 17 U.S.C. § 110.

Only a few of the activities permitted under Section 110 include the use of dramatic works. Section 110(1) for face-to-face teaching applies to all types of works. Section 110(3) allows places of worship to perform a "nondramatic literary or musical work" or a "dramatico-musical work of a religious nature." Section 110(5)(A) permits a business establishment in effect to allow customers to hear performances of all types that are received through a common radio or similar device. Section 110(9) allows the single, isolated performance and transmission of a dramatic work for the benefit of persons who are blind or have other disabilities. This provision includes several extraordinarily tight conditions and requires the dramatic work to have been "published at least ten years before the date of the performance." 17 U.S.C. § 110. All of these decisions by Congress to allow certain activities at the possible expense to copyright owners are a matter of public-policy determination. See generally GROVER STARLING, THE POLITICS AND ECONOMICS OF PUBLIC POLICY: AN INTRODUCTORY ANALYSIS WITH CASES 9 (1979) (defines "redistributive policies" as involving "a conscious attempt by the government to manipulate the allocation of wealth, property rights, or some other value among the broad categories of private individuals in society").


The Copyright Act grants the public performance right with respect to "musical works," which are distinct from a "sound recording." 17 U.S.C. § 106(4).

While the performer may well hold the copyright to the sound recording in many cases, as a practical matter performers often have assigned rights to producers or production companies, and in 1999 Congress amended the definition of "work made for hire" to encompass sound recordings under some circumstances, leaving the copyright with the employer and not with the performer. 17 U.S.C. § 101.

For a general study of the implications of copyright law for new technologies, see Trotter Hardy, The Internet and the Law: Copyright and “New-Use” Technologies 23 NOVA L. REV. 657 (1999).

The Copyright Act includes this definition:

To perform or display a work "publicly" means—

1. to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

2. to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.


49 Portions of Part III of this article are based on material that the author included in an earlier publication. See Kenneth D. Crews, Copyright and Distance Education: Displays, Performances and the Limitations of Current Law, in GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY 369 (Laura N. Gasaway ed., 1997).


53 Either an analog or digital transmission of the sound recording could still be an infringing performance of the copyright protected musical composition or other work that is the subject of the recording.


55 The full text of Section 110(1) is as follows:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made. . . .


56 Scrutinizing the language of Section 110(1) reveals four essential conditions to applying the law: performance made by instructor or pupils; in face-to-face teaching; in a nonprofit institution; and in a classroom or similar place. In addition, Section 110(1) adds the final clause against using copies of videotapes and other audiovisual works that are known to be infringing. 17 U.S.C. § 110(1).


59 The standard of reaching beyond the campus is consistent with the general statement of permission that accompanies many videotapes that are marketed for educators and academic libraries. Such statements often allow closed-circuit transmissions, and often only to sites on the same campus where the transmission originates.

60 See supra note 55.

61 The statute alone does not specify whether members of the class may simply recite lines from a dramatic work or make a dramatic reading of a nondramatic work, such as a novel. The House Report from 1976 sheds some light on Congress's intent: "a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form." House Report, supra note 57, at 83.

62 See supra text accompanying notes 14-18.

63 See supra text accompanying notes 38-41.

64 See supra text accompanying note 40.

the instructional transmission need only be made “primarily” rather than “solely” to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made “primarily” for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the “primary” purpose of a program would include its subject matter, content, and the time of its transmission.

House Report, supra note 57, at 83. Hence, instructors can broadcast via cable, but the content and other circumstances should be clearly oriented toward creating a learning environment, and not toward making a work of general interest to the cable viewers.

The statute could have been even more restrictive. An early Senate bill would have added the requirement that the transmission have this geographical limit: “the radius of the area normally encompassed by the transmission is no more than one hundred miles.” S. 597, 90th Cong., 1st Sess., § 110(2)(B) (1967). For an expression of deep concern about that provision, see Eugene N. Aienikoff, Educational Television—A Non-Commercial Viewpoint 53 IOWA L. REV. 880, 883 (1968).

I can attribute this description to Professor Robert Kreiss, University of Dayton School of Law, which he made at a meeting of the Society of Ohio Archivists on October 16, 1999.

The current Section 110(2) is silent on the subject of making copies and facilitating asynchronous delivery of instructional content; inferring a right of use from silence is easily open to criticism. An early version of the provision, however, did specifically prohibit asynchronous delivery with this added condition to the right of use: “the time and content of the transmission are controlled by the transmitting organization and do not depend on a choice by individual recipients in activating transmission from an information storage and retrieval system or any similar device, machine, or process.” H.R. 2512, 90th Cong., 1st Sess. (1967). One commentator concluded that this language “is deliberately aimed at preventing the full use of presently existing technology by forbidding the use of information-retrieval systems in conjunction with an ETV system.” Note, Wasteland, supra note __, at 124. The same writer insightfully addressed the future feasibility of computer systems that could allow access to instructional content from remote locations, and noted the benefits to education as well as the threat to copyright owners. Id., at 124-25.

Although Section 112(b) specifically allows the institution to make copies, and does not mention any right of distribution or transmission of those copies, the House Report details that the thirty copies may be used for future transmissions by the original source, or they may be exchanged with other broadcasters for their transmission.


See supra note 5.

See ROBERT HEINICH, ET AL., INSTRUCTIONAL MEDIA AND TECHNOLOGIES FOR LEARNING 386-88 (5th ed. 1995). This particular publication is most confounding. In a few pages, it surveys fundamentals of copyright law as relevant to educators. Under the subheading of “Distance Learning Settings,” the authors outline a few points
derived from scattered and unrelated copyright sources, including a few points drawn from Section 110(2) without citation. The authors then conclude sweepingly: "If the class is being recorded, it is a definite copyright infringement if prior approval for material presentation is not obtained." Id., at 388.

The legislative history of § 110(2) suggests another critical reason why the statute has been neglected and overlooked. Much of the language of the provision was developed in 1964 and 1965, when the House of Representatives held extensive hearings on it. See infra text accompanying notes 156-57. Active in those hearings were officers of educational television systems, while educators and librarians had a lesser role. By the time the statute was enacted in 1976, educators were focused more on § 107, distance education had shifted from elaborate broadcasting systems to more individualized pursuits, and in the normal span of a dozen years the individuals active in 1965 were likely involved in other occupations. With the passage of time, the statute Congress enacted had become disconnected from the individuals who had in the meantime stepped into some responsibility for implementing it.


The inapplicability of 110(2) and the problems with interpreting 107 were underscored in the Conference on Fair Use (CONFU), an informal gathering of interested parties, under the aegis of the National Information Infrastructure Task Force, seeking to develop mutual understandings or "guidelines" on fair use. The final report from CONFU includes a draft of "Proposal for Educational Fair Use Guidelines for Distance Learning." INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, November 1998, at 43-48. Like most proposals in the CONFU report, these guidelines became the object of extensive debate and disagreement and ultimately were not widely accepted in the educational community. For a general discussion of the guidelines, their origins, and the surrounding controversies, see Laura N. Gasaway, Guidelines for Distance Learning and Interlibrary Loan: Doomed and More Doomed, 50 J. AMER. SOC'Y INFO. SCI. 1337 (1999).

Of course, some methods for carrying out distance education, notably the creation of websites, are prone to individual development without necessitating centralized oversight.


DISTANCE EDUCATION REPORT, supra note 1. Part IV of the present article is based in part on portions of an earlier essay by this author. See Kenneth D. Crews, The U.S. Copyright Distance Education Report 3 INFO. OUTLOOK 44 & 46 (1999).

Other commentators have suggested various revisions to Section 110(2). See, e.g., Laura N. Gasaway, Copyright: A Challenge to Distance Learning-Part I INFO. OUTLOOK 43, 43 (1998) ("The best solution for education is to amend the Copyright Act to make it clear that distance learning is the modern equivalent of face-to-face instruction.").

DISTANCE EDUCATION REPORT, supra note 1, at 140-59.

DISTANCE EDUCATION REPORT, supra note 1, at 154-55.

DISTANCE EDUCATION REPORT, supra note 1, at 158.

DISTANCE EDUCATION REPORT, supra note 1, at 158.

DISTANCE EDUCATION REPORT, supra note 1, at 158-59.

Specifically, the Copyright Office is contemplating the "transient copies" that are "part of the automatic technical process" of the transmission. The Copyright Office does not suggest that educators should be allowed to make copies of works for students in distance learning; "Rather, the amendment should include these rights only to the extent technologically required in order to transmit the performance or display authorized by the exemption."

DISTANCE EDUCATION REPORT, supra note 1, at 146-47.

DISTANCE EDUCATION REPORT, supra note 1, at 148-50.

DISTANCE EDUCATION REPORT, supra note 1, at 148-50.

DISTANCE EDUCATION REPORT, supra note 1, at 147-48.

DISTANCE EDUCATION REPORT, supra note 1, at 143 & 148. Like distance education, electronic reserves was the subject of discussion in CONFU, see note 83 supra, but the final report did not include the text of draft guidelines that emerged from the process. For an examination of the unusual processes and controversies surrounding this
issue in CONFU, see Kenneth D. Crews, *Electronic Reserves and Fair Use: The Outer Limits of CONFU* 50 J. AMER. SOC’y INFO. SCI. 1342 (1999) (written by the present author, who was a participant in the CONFU proceedings).

98 DISTANCE EDUCATION REPORT, supra note 1, at 148.
99 DISTANCE EDUCATION REPORT, supra note 1, at 151.
100 DISTANCE EDUCATION REPORT, supra note 1, at 151. Recent amendments to the Copyright Act have in other respects begun to require users of copyrighted works to take the initiative to inform others about copyright protection. For example, the Digital Millennium Copyright Act, 105-304, 112 Stat. 2860, ___ (1998), offered possible protection for online service providers when users of networked systems commit copyright infringements. In some instances, the provider is obligated to give users “materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.” 17 U.S.C. § 512(e)(1)(C).
101 DISTANCE EDUCATION REPORT, supra note 1, at 151. When libraries make copies of materials under Section 108 of the Copyright Act, they are currently required to include on the copies the formal copyright notice found on the original work. If no such notice appears on the original, then the copies may include only “a legend stating that the work may be protected by copyright.” 17 U.S.C. § 108(a)(3).
102 DISTANCE EDUCATION REPORT, supra note 1, at 152. This proposal builds on the new provisions of the Copyright Act that prohibit the circumvention of technological protection systems that control access to copyrighted works. 17 U.S.C. § 1201(a). See also infra text accompanying notes 133-139.
103 DISTANCE EDUCATION REPORT, supra note 1, at 161n.379.
104 U.S. Const., Art. I, Sec. 8.
106 But see Theodore R. Jackson, *Copyright Exemptions and the Educational Media* 6 PERFORMING ARTS REV. 30, 36 (1977) (arguing that the Copyright Clause allows Congress to grant rights to owners, not necessarily to create limitations or exceptions).
107 See, e.g., 17 U.S.C. § 102(b) (precluding copyright protection for ideas, processes, and many other creations); 17 U.S.C. § 105 (barring copyright protection for works of the U.S. government).
108 DISTANCE EDUCATION REPORT, supra note 1, at 140-46.
109 DISTANCE EDUCATION REPORT, supra note 1, at 144.
110 DISTANCE EDUCATION REPORT, supra note 1, at 144-45 (quoting from the House Report, supra note 57, at 81). The Copyright Office report added that the critical issue is not how to expand owner’s rights or user’s rights, but instead how to preserve the “policy balance struck in 1976.” Id., at 145. One early commentator argued for the need to grant a right of use for distance education in order to achieve a constitutionally required balance against the broad rights of copyright owners. See Note, *Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights*, 51 IOWA L. REV. 1049, 1062 (1966).
111 Public policy analysis is premised on identifying a set of goals that policymakers seek to achieve, and the identification of goals implies a choice from among alternatives. See, e.g., CHARLES L. COCHRAN & ELOISE F. MALONE, *PUBLIC POLICY: PERSPECTIVES AND CHOICES* 1 (1995) (“Public policy consists of political decisions for implementing programs to achieve societal goals.”). See also STUART NAGEL, *POLICY STUDIES: INTEGRATION AND EVALUATION* 3 (1988) (“Public policy analysis can be defined as the process of determining which of various alternative public or governmental policies will most achieve a given set of goals in light of the relations between policies and goals.”).
112 A staff member of the Copyright Office recently stated publicly that Congress was not likely to take any action in response to the distance-education report until into the 107th Congress. [See 59 Patent, Trademark & Copyright J. (BNA) 645 (Mar. 10, 2000).]
113 DISTANCE EDUCATION REPORT, supra note 1, at 20.
115 DISTANCE EDUCATION REPORT, supra note 1, at 132.
116 DISTANCE EDUCATION REPORT, supra note 1, at 29-47.
117 DISTANCE EDUCATION REPORT, supra note 1, at 41-42.
118 DISTANCE EDUCATION REPORT, supra note 1, at 31.
While most discussion of licensing in the report centers on the inability of educators to secure licenses in an efficient and economical manner, the report also briefly suggests that a meaningful statutory exception could actually facilitate the making of licenses for the benefit of all parties. While describing the problems that librarians in particular have faced, the report adds: “They also point out that the scope of legal exceptions can affect the relative bargaining power of copyright owners and users.” DISTANCE EDUCATION REPORT, supra note 1, at 135.


DISTANCE EDUCATION REPORT, supra note 1, at 149.

DISTANCE EDUCATION REPORT, supra note 1, at 150 (quoting from House Report, supra note 57, at 84).


Notably demonstrating this process was the amendment of the Copyright Act in 1980 to specify that computer software was protectible; at the same time Congress revised Section 117 to grant to users the right to make copies of computer programs for limited purposes. Similarly, in 1990, Congress specified that architectural works were within the purview of copyright, and Congress simultaneously added Section 120, which allows the public to make pictures or other illustrations of constructed architectural works without infringing the rights of the copyright owner. See, e.g., Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998); Digital Performance Right in Sound Recordings Act, Pub. L. 104-39, 109 Stat. 336 (1995).


A sound recording typically embodies at least two copyrights. First, the performer whose voice or music is captured on the recording holds a copyright. Second, the composer or author of the content holds a separate copyright. The discussion at this stage of the article refers only to the rights in the recorded performance. An educator may well have not infringed on that right, but could easily have infringed on the rights of the composer or author when making the transmission of the work.

DISTANCE EDUCATION REPORT, supra note 1, at 156.

DISTANCE EDUCATION REPORT, supra note 1, at 157.


The report carefully preserves, and explicitly avoids interfering with, the right of copyright owners to “apply technological protections to their works.” DISTANCE EDUCATION REPORT, supra note 1, at 152.

DISTANCE EDUCATION REPORT, supra note 1, at 44.

DISTANCE EDUCATION REPORT, supra note 1, at 102.

DISTANCE EDUCATION REPORT, supra note 1, at 150.

The Copyright Office report notes that bills in Congress in 1997 would have revised Section 110(2), but Congress exhibited little inclination to act on them. DISTANCE EDUCATION REPORT, supra note 1, at 119-121.

For an example of the difficulty of bringing some practical meaning to fair use, see Janis H. Bruhwheide, Copyright and Distance Education 21 LIBR. ACQUISITIONS: PRACTICE & THEORY 41 (1997).

The interrelationship between fair use and a specific exception for distance education has been debated since the earliest drafts of the Copyright Act of 1976. See, e.g., Note, Copyright Law Revision: Educational Broadcasting and the Proposed Limitations on Exclusive Performing Rights, 51 IOWA L. REV. 1049, 1061-62 (1966).

DISTANCE EDUCATION REPORT, supra note 1, at 130.


DISTANCE EDUCATION REPORT, supra note 1, at 130.
DISTANCE EDUCATION REPORT, supra note 1, at 112. Later the report notes: "As discussed above, the topic of guidelines as a whole has become controversial in recent years, at least in part due to concerns about their tendency to be treated as absolute rules, and their impact on possible legislative alternatives." Id., at 131.

The Copyright Office report suggests that the rulemaking exceptions to the prohibition against circumvention of technological protections, 17 U.S.C. § 1201(a)(1)(C), could encompass uses for distance education. DISTANCE EDUCATION REPORT, supra note 1, at 103. As of this writing in early 2000 the Copyright Office is holding hearings and considering possible exceptions.

DISTANCE EDUCATION REPORT, supra note 1, at 58.

DISTANCE EDUCATION REPORT, supra note 1, at 57.

DISTANCE EDUCATION REPORT, supra note 1, at 146-47.


See supra text accompanying notes.

DISTANCE EDUCATION REPORT, supra note 1, at 83. The report ultimately recommends that educators be allowed to make "ephemeral copies" of transmissions largely to make the transmission possible, but not necessarily to retain the materials on a site "for later access by students." Id., at 160-61.

DISTANCE EDUCATION REPORT, supra note 1, at 38.

See supra text accompanying notes 140-147.


H.R. 4347, 89th Cong., 1st Sess. (1965). Section 109 of this bill has language remarkably similar to the provisions of the current Section 110(2), suggesting that the current statute is built not only on circumstances from 1976, but on conceptions of distance education from yet a decade before. In its most germane provision, the 1965 bill provided that the following is not an infringement: "performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution."

The Deputy Register argued for the need to reform copyright law in general with a reflection on the rapid pace of technology he witnessed in 1965, which offers insight about the technological revolution of more recent years. He noted that the law was last fully revised in 1909: "As some of us can recall, that might be termed a 'horse and buggy' era. This was long before the technological development of radio, Telstar, tape recorders, long-playing high-fidelity phonographic recordings, electronic computers, xerographic copying machines, and Cinerama motion pictures in full color. So you can see that there is a reason why this horse-and-buggy law needs to be brought up to date." U.S. House of Representatives, Copyright Law Revision, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, Part I, at 40 (1965) (remarks of George D. Cary, Deputy Register of Copyrights) (hereinafter House Hearings, 1965).


The Deputy Register also argued that the pending bill reflected an appropriate balance between the needs of education and the interests of copyright owners. House Hearings, 1965, supra note 158, at 39-40.

Not everyone from the Copyright Office was certain that the bill would only reflect a continued balance of owner and user rights. Abe Goldman, then general counsel to the Copyright Office, noted that the 1909 Act did not grant a public performance right for nonprofit uses of nondramatic works; the bill allowed nonprofit broadcasts, but only for transmission to classrooms and similar places. Consequently, if the bill were law, the ability to use nondramatic works would not be as broad, and even nonprofit entities would not be able to transmit nondramatic works to the public in general at various locations. House Hearings, 1965, supra note 158, at 55-56 (remarks of Abe Goldman). See also House Hearings, 1965, supra note 158, at 65 (remarks of Kenneth B. Keating).

House Hearings, 1965, supra note 158, at 40.

House Hearings, 1965, supra note 158, at 40.

See, e.g., House Hearings, 1965, supra note 158, at 317 (remarks of Harold E. Wigren for Ad hoc Committee of Educational Institutions and Organizations on Copyright Law Revision).

One member of Congress anticipated exactly this outcome. Testifying in 1965, Congressman Emanuel Celler stated: "I am advised that the publishers and authors on the one side and the educational groups on the other have now dug in and are engaged in positional or trench warfare." House Hearings, 1965, supra note 158, at 1854. The
congressman proceeded to predict that the subcommittee would not recommend giving either side all that it seeks. *Id.*, at 1855.


167 Compare to the concern about “discrimination” quoted at text accompanying note 115 *supra*.


169 House Hearings, 1965, *supra* note 158, at 69 (remarks of Lee Deighton). The witness added: “The end result of this free use would be to displace the educational materials we publish and ultimately destroy our market.” *Id.*, at 69.

170 House Hearings, 1965, *supra* note 158, at 140 (remarks of Horace S. Manges). Naturally, to the publishing industry, this growth was perceived as a threat to the market for publications, and Mr. Manges argued that nondramatic works should receive the same protection that dramatic works receive, asserting that the distinction between dramatic and nondramatic works “is no longer reasonable.” *Id.*, at 140.


172 See *supra* text accompanying notes 150-154.

173 In October 1998 Congress directed the Copyright Office to prepare the report according to detailed criteria and to deliver the report within six months. See Digital Millennium Copyright Act, Pub. L. 105-304, § 403, 112 Stat. 2860, ___ (1998).

174 See *supra* text accompanying notes 109-110.

175 One undesirable result of this dynamic is that it places on Congress all responsibility for finding the balance, and it encourages the interested parties to take strident positions in anticipation of a compromise outcome. In this context, hearings are likely to elicit inevitable conflict and little voluntary reconciliation.