Mr. Chairman and members of the Subcommittee, I am John Vaughn, Executive Vice President of the Association of American Universities. I am pleased to have this opportunity to testify on behalf of the undersigned organizations on S. 487, the Technology, Education, and Copyright Harmonization (TEACH) Act of 2001. This bill is the product of a long series of studies, reports, deliberations and comprehensive negotiations by Congress, the Copyright Office, and the stakeholders in distance education including the education, library, and content communities. S. 487 would significantly increase the capacity of digital distance education to expand teaching and learning in time, place, and richness of content, and would do so...
in ways that protect the interests of copyright owners.

S. 487 achieves an effective balance between expanded online educational use of copyrighted materials and appropriate safeguards against their misuse. The bill has the support of the education, library and content communities, and we believe it deserves the strong support of this subcommittee. We hope that you will move the bill through the legislative process to passage without amendment by the House, to be signed into law by the President. I would like to explain why we believe such treatment is warranted.

Distance education is not new. It has been with us for more than a century, in the form of correspondence courses, instructional radio broadcasts, and more recently as instructional television. What has changed dramatically in the last few years is the rapid development of digital technology, computer networks, the global Internet, and their application to education. From computers in the classroom augmenting traditional educational materials, to the heretofore impossible online delivery of life-long learning to adults to enhance their career skills and expand their knowledge and understanding more generally, computer networks are revolutionizing the opportunities for both formal and informal education and training.

Distance education has grown in the past few years using material from the public domain and, where available, licensed material. However, that growth has been, and will continue to be, hampered by the disparity in the Copyright Act between the clear exemption available for performances and displays of works in face-to-face classroom teaching, and the limitations on the exemption now available for transmitted performances and displays. It is this disparity that S. 487 is intended to address. It is the elimination of this disparity that is essential to the full realization of the enormous potential of online distance education.

The question that S. 487 answers was first put to Congress during its deliberations on the Digital Millennium Copyright Act (DMCA): does the development of online distance education require changes to the "distance education" exemption as it currently exists in Section 110(2) of the Copyright Act? Congress could not answer the question with the information available to it at the time. Accordingly, it asked the Copyright Office to conduct a study of distance education and submit a report to Congress with "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." As this excerpt from the charge to the Copyright Office makes clear, Congress recognized the importance of developing the full potential of digital distance education to capitalize on the expanded educational benefits to society that would result. Congress also made clear the need to maintain a balance between the rights of owners and the needs of users of copyrighted works.

The Register of Copyrights has described to you the study that her office
undertook. I will simply add my commendation to the Register for the thorough, open, and fair process by which she and her staff conducted the study, and the comprehensive, thoughtful report they prepared from that study. Included among the recommendations of the Copyright Office report were recommendations for changes to copyright law that would allow educators to use digital technologies to achieve the goals of the distance education exemption enacted in 1976. The cogent analyses of the Copyright Office report made possible and formed the basis for the legislation we are considering today.

As important as the Copyright Office report was in identifying needed legislative changes, many obstacles lay ahead in translating the report’s recommendations into legislation that could be passed into law. On March 7, Senators Hatch and Leahy introduced the TEACH Act as an initial transcription of the Copyright Office recommendations into legislation. As indicated at a March 13 hearing on the TEACH Act, the views of the affected parties were widely divergent: the education community testified in support of the bill, but also argued for a number of changes that we believed were important to achieve the critical goal of parity between the content of online distance education and the traditional, residential classroom; the publishers testified against the bill, arguing that no legislative changes to current law were warranted, and adding that if Congress were to conclude that legislation was needed, the TEACH Act should be changed a number of ways that generally moved in the opposite direction of the changes proposed by education groups.

To break this impasse, the Senate Judiciary Committee asked the Copyright Office to moderate a process of negotiations between the education and content communities. The groups involved in the negotiations expanded over time to include additional education groups and library representatives on the education side, and additional content groups on the content side. Both groups maintained contact with broader constituencies throughout the negotiations. The negotiations were carried out with occasional breaks for more than a month, from late April through the end of May.

The negotiations were difficult, involving intense debates over critical issues on which the parties had often sharply diverging and strongly held views. But the negotiations were conducted with candor, good faith, and a recognition of the need for compromise. In the end, I believe that all parties agreed that we had produced a legislative product that resolves the problems embedded in the initial version of S. 487 and provides a means of bringing online educational content into closer accord with that which can be provided in a traditional classroom, and does so in a manner that protects against the misuse of digital copyrighted material.

The negotiated product includes a complex set of agreements on interrelated provisions of Sections 110(2) and 112 of the Copyright Act. Further, during the negotiations, it became clear that it was important not to affect other provisions of the Copyright Act, either explicitly or implicitly.

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S. 487 would change current law in a number of ways that would significantly enhance online distance education, including:

- expanding the categories of works that can be used in distance education performances, from nondramatic literary and musical works to reasonable and limited portions of any other works,

- removing the concept of the physical classroom, thereby permitting digital educational content to be delivered to any location where the student can access a computer terminal,

- permitting the storage of copyrighted material on servers in order to permit authorized performances and displays to be made asynchronously,

- permitting the digitizing of works from the wealth of analog material for distance education when a digital version of a work is not available to the institution or the digital work is subject to technological protection measures that prevent its use,

- clarifying that participants in authorized digital distance education are not liable for infringement for any transient or temporary reproductions that occur through the automatic technical process of digital transmission.

S. 487 also includes a number of important safeguards against the unauthorized and inappropriate use of copyrighted material. These safeguards include:

- requiring performances and displays to be part of mediated class instruction under the actual supervision of an instructor,

- portion limitations, including limiting performances of works other than nondramatic literary or musical works to reasonable and limited portions, and limiting displays to amounts typically displayed in a live classroom setting,

- limiting the receipt of materials to enrolled students to the extent technologically feasible,

- requiring institutions to apply technological protection measures that reasonably prevent the retention of the work in accessible form for longer than the class session and the unauthorized further dissemination of the work,

- requiring that performances and displays are given by means of copies or photocopies that are lawfully made and acquired,
• adding the criterion of accreditation (read as state licensure or certification for K-12 educational institutions) to the criterion of nonprofit educational institutions contained in current law.

Taken together, the legislative changes to current law contained in S. 487 will move online distance education substantially toward the goal of parity of content with that available within a traditional, residential classroom—an essential condition for realizing the extraordinary potential of online distance education; and they will do so without creating significant new risks for copyright owners.

As difficult as this product was to achieve through the negotiation process, the result was one that all parties to the negotiations agreed to support throughout the remaining legislative process. The negotiators recognized that the complex set of agreements has produced a product that is sound and fair in substance, but that it is also a product that cannot brook changes without jeopardizing the carefully crafted compromises and commitments that made this legislation possible.

Therefore, we respectfully request that this subcommittee and the full Judiciary Committee mark up S. 487 without amendment and send the bill to the House of Representatives for passage without change. We are fully aware of the presumption of asking you to accept this product without change, and surely reasonable changes could be proposed. We recognize and appreciate the bill introduced by Congressman Boucher, a long-time supporter of distance education, and Congressman Issa, who has a strong background in the information technology industry that has helped make the power of online distance education possible.

Nonetheless, we believe that the process that has produced S. 487—beginning with the Congressional recognition of the twin challenges of promoting digital distance education while preserving the interests of copyright owners, the decision by Congress to call on the Copyright Office to address these difficult issues, the thorough study and report produced by the Copyright Office, the translation of the Office recommendations into prototype legislation by Senators Hatch and Leahy, and the good faith but arduous negotiations conducted by the key affected parties—this sequence of events has been an effective public policy-making process that has drawn on Congress, the Executive Branch, and external stakeholders to produce a sound, carefully crafted product that should now be carried to the final step of being enacted into law.

We appreciate the attention given by this subcommittee to distance education, and we look forward to working with you to strengthen the nation's educational capacity through the development of online distance education.

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