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The TEACH Act

BACKGROUND

Computer technologies and the Internet increasingly supplement and even bypass the traditional classroom. These technologies make effective distance education possible through online instruction, facilitating teacher and student communication as well as communication between students. In addition, educational institutions are relying more often on resources in digital formats. To enhance distance education, instructors need to use copyrighted material, including digital resources, in the online classroom. These factors set up a conflict between educational institutions and copyright holders, whose works are a critical component of distance education.

THE TEACH ACT

In an attempt to balance the sometimes conflicting needs of distance educators and copyright holders, Congress passed the *Technology, Education, and Copyright Harmonization Act of 2002*¹ more commonly known as the “TEACH Act.” According to a House report, the TEACH Act:

“updates the distance education provisions of the Copyright Act for the 21st Century. The act allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet, while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in a digital format.”²

The TEACH Act substantially amends 17 U.S.C. § 110(2). What is now permissible under copyright law is no longer restricted to the earlier environment of closed-circuit TV.³ Before the TEACH Act, section 110(2) placed significant limitations on educators by 1) limiting performance rights to a specific subset of works and 2) restricting transmission of these performances to classrooms or similar locations.⁴ These restrictions obviously would prevent online instructions from reaching students with computers who were not physically tethered to a classroom.

In addition to the critically important benefit of allowing transmission to any location, the TEACH Act also permits the display and performance of “nearly all types of works.”

¹ Pub. L. No. 107-273, § 13301, 116 Stat. 1910 (2002) (codified as 17 U.S.C. § 110(2), 112(f) (2005))

² H.R. Rep. 107-687, *Technology, Education, and Copyright Harmonization Act of 2001*, at 2.

³ Kenneth D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act* <http://www.ala.org/ala/washoff/woissues/copyrightb/distanced/teachsummary.pdf>
[hereinafter Crews, *New Copyright Law for Distance Education*]

⁴ Crews, *New Copyright Law for Distance Education*.

It permits the storage of copies of copyrighted works and allows student access for brief periods of time; it also allows incidental or necessary copying and storage as needed for digital transmission technologies; and it permits digitization of some analog works not otherwise available in digital format.⁵

“Mediated Instructional Activities”

The TEACH Act incorporates a distinct view of distance education as “mediated instructional activity” and the Act explicitly defines this concept:

“the term “mediated instructional activities” with respect to the performance or display of a work by digital transmission . . . refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media . . . which are typically purchased or acquired by the students in higher education for their independent use and retention”⁶

The concept of “mediated instructional activities” is central to understanding the TEACH Act, as this significant statutory requirement places important restrictions and responsibilities on educators. It requires that instructors actually transmit the work or supervise such use themselves. As applied to distance education, it requires that instruction “should occur in discrete installments, each within a confined span of time, and with all elements integrated into a cohesive lecture-like package.”⁷ The adherence to mediated instructional activities is intended to prevent online use of copyrighted works in ways that might undermine the market for those works. Thus the law prohibits using the copyrighted works in ways that could not have occurred in a traditional classroom.

The Act only applies to a “government body or accredited nonprofit educational institution”⁸ as determined by well-known educational accreditation organizations. Most schools would meet this requirement, but private, for-profit institutions may not qualify.⁹ Significantly, many of the Act’s requirements “focus entirely on the behavior of educational institutions, rather than the actions of instructors.”¹⁰ These responsibilities and requirements include: implementation of copyright policies; dissemination of copyright information to faculty, students, and staff; providing explicit copyright notices to students; using reasonable technological measures to prevent students from accessing copyrighted works beyond the “class session”; preventing students from disseminating

⁵ Id.

⁶ 17 U.S.C. § 110(11) (Supp. IV 2004); “mediated instructional activities” . . . is intended to require the performance or display to be analogous to the type of performance or display that would take place in a live classroom setting.” H.R. Rep. 107-687, Technology, Education, and Copyright Harmonization Act of 2001, at 10.

⁷ Crews, *New Copyright Law for Distance Education*

⁸ 17 U.S.C. § 110(2)(2000).

⁹ Crews, *New Copyright Law for Distance Education*

¹⁰ Id.

such works without proper authorization; not interfering with technological measures used to protect copyrighted works; and limiting temporary storage of works by not keeping them beyond a reasonable time needed for their transmission to students.¹¹ These requirements mean that educational institutions will likely take a centralized approach to implement distance education, in order to ensure adherence to the Act's provisions, rather than decentralizing it and permitting individual departments and instructors to be responsible.

The Act also seeks to prevent distance education from undermining the market for some types of educational works by preventing the use of works already formatted for transmission "via digital networks."¹² In the case of subscription databases, for example, instructors may not download copyrighted material from a subscription database or scan paper versions of the same copyrighted material for transmission during distance education; instead, the Act requires that the students access the material directly from the subscription database. Furthermore, analog materials cannot be digitized for use unless 1) the amount converted is limited to the amount "authorized to be performed or displayed under section 110(2) if 2) "no digital version of the work is available to the institution" or if the available digital version is blocked by "technological protection measures that prevent its use"¹³

The TEACH Act's many requirements reflect the tension between the benefits of distance education and the risks to copyright holders in observing that:

"digital transmission technologies present new educational opportunities, such as the ability to provide a media-rich, interactive educational experience to students unable to attend classes at the physical location of the institution. On the other hand, the ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies, create new risks for the owners of copyrighted works used in distance education."¹⁴

The TEACH Act potentially facilitates the use of copyrighted works to enhance distance education while also protecting copyright holders, but there is criticism of the Act's many requirements, some of which may be difficult to implement in a digital environment. Many of the requirements put educational institutions themselves at risk for liability, thus encouraging a centralized and perhaps more bureaucratic and risk-averse approach to implementing distance education. One analyst believes that the "long list of requirements is at best a significant challenge, and at worst so cumbersome that institutions and instructors will simply ignore it."¹⁵ Time will tell whether the TEACH Act strikes the right balance or whether its requirements are simply too stringent for the 21st Century and beyond.

- Michael Hannon, AALL Copyright Committee

¹¹ Crews, *New Copyright Law for Distance Education*

¹² 17 U.S.C. § 110(2)(2000).

¹³ S. Rep. No. 107-31, at 3 (2001).

¹⁴ S. Rep. No. 107-31, at 5 (2001).

¹⁵ Stephana I. Colbert & Oren R. Griffin, *The Teach Act: Recognizing Its Challenges and Overcoming Its Limitations*, 33 *Journal of College and University Law*, 499, at 507.