Technology, Education and Copyright Harmonization Act

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Gayle W. Griggs, Cluster 32

INTRODUCTION

Just over a year ago, on November 2, 2002, President George W. Bush signed into law the TEACH Act. This act amends two sections of the U.S Copyright Law of 1976, section 110, “Limitations on exclusive rights: Exemption on certain performances and displays” (Subtitle C, 2002, ¶ 2), and 112, “Limitations on exclusive rights: Ephemeral recordings”(Subtitle C, 2002, ¶ 15). These amendments were vital since the Copyright Law amendments of the Digital Millennium Copyright Act (DMCA) of 1998 did not give sufficient consideration to the Distance Education setting. Because of this, the TEACH Act was developed and Sections 110 and 112 were amended. Sections 110 and 112 relate directly to the application of copyrighted technological materials in synchronous and asynchronous Distance Education courses.

The TEACH Act’s purpose is to promote Distance Education through digital technologies, and as stated by Peters (2003), serves as a “balance between copyright owner’s rights and the needs of the users” (¶ 2). According to McClary (2003), the TEACH Act “covers materials prepared for at-home use by students enrolled [in] courses taught in traditional classroom settings as well as distance learning courses (¶ 1). The act “extend[s] the exemption from infringement liability for instructional broadcasting to digital distance learning or distance education” (Recent Events, ¶ 18) but specifies and limits the law’s application, as Harper (2002) indicates, only to” in class performances and displays” or “mediated instruction”, and not to “digital delivery of supplemental reading materials (¶ 7). For that, the user of copyright materials would have to rely more on the Fair Use or fair practices of a copyrighted work.
FAIR USE

Fair Use is the use of copyrighted material “as is” without permission of the author for purposes of parody, criticism, illustration, clarification, or comment. This includes news reporting; research and scholarship associated to copyrighted material; education; and teaching. Fair Use allows the reproduction of copyrighted material by libraries to replace damaged copies; by teachers and students to reproduce a portion of a work in order to illustrate a lesson; by legal organizations for judicial proceedings and reports; and for “incidental and fortuitous reproductions in a newsreel or broadcast of a work located in a scene of an event reported” (In answer, 2003, ¶ 8). Fair Use stipulates that credit must be given to the author of the work concurrently with the work used, even if permission by the author to reproduce the work is granted.

COPYRIGHT LAW

Russell (2002) states that the purpose of the Copyright Law is to allow the reproduction of works in order to “advance the progress of Science and the Useful Arts” (¶ 4). In addition, Templeton (n.d) adds that it serves “to protect the author’s right to obtain commercial benefit from valuable work”, and to protect “the author’s general right to control how a work is used” (¶ 28). The Copyright Law also acknowledges that any work that exists in Public Domain such as Federal Government documents, and expired or abandoned copyrights authorizes free copying of the works, and does not pertain to the Copyright Law (Copyright protection, 2003, ¶ 15).

MAJOR PROVISIONS OF THE TEACH ACT

Section 110: Exemption on Certain Performances and Displays

In Section 110, “Limitations on exclusive rights: Exemption on certain performances and displays” of the TEACH Act, digital and analog transmissions of “reasonable and limited
portions” of lawfully made copies of dramatic literary works, or works with a “story” such as plays, certain motion pictures, operas and any other dramatic work, is allowed as long as the transmission of such materials is “equivalent to a live classroom setting”, classified as a “mediated instructional environment”. The Act recognizes the transmission of full dramatic works only if they are considered “necessary for the course” such as entire films in a Film History course as Russell (2002) notes (p. 3).

The TEACH Act allows the transmission of non-dramatic works in their entirety and includes poetry, short stories, photographs, artwork, slides, charts, journal and periodical articles, maps, and some types of music in their list of exempt works.

According to Harper (2002), Section 110 of the TEACH Act stipulates that any “performance or display of a work must be a regular part of systematic mediated instructional activity; made by, at the direction of, or under the supervision of the instructor; for and technologically limited to students enrolled in the class (¶ 13). The Act requires that the institution:

Institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection (Subtitle C, 2002, ¶ 10).

The institution must also assure that the student cannot retain any of the material transmitted for further circulation or dissemination.

Works excluded from the TEACH Act include those works that are produced for the sole purpose of use in Distance Education and include digital courses or “course paks” that are
available for purchase (Russell, 2002, p. 3). The TEACH Act also specifies that materials that are reproduced in order to avoid their purchase, such as scanned copies of whole books, do not fall into the category of exemption. However, the TEACH Act allows the reproduction of small amounts of materials in textbooks such as graphs, etc. (Russell, 2002, p. 3). Unlawfully made copies, or pirated copies of a work, such as peer-to-peer file sharing sources, are also excluded from the TEACH Act.

Section 110 specifies that higher education institutions must be accredited by the Council of Higher Education or the Department of Education, and be classified as nonprofit educational institutions, in order to enjoy the TEACH Act exemptions. An elementary or secondary institution must be “recognized by the applicable state certification or licensing procedures” in order to apply educational use copyright exemption (Subtitle C, 2002, ¶ 17).

Section 112: Ephemeral recordings

Harper (2002) explains that Section 112 of the TEACH Act authorizes “educators to make the copies necessary to display and perform works in a digital environment” and includes the right to “copy digital works and digitize analog works in order to make authorized displays and performances” (¶ 15).

Harper (2002) adds that these rights are exempt only if the following conditions are met:

1. Such copies are retained only by the institution and used only for the activities authorized by Section 110; and

2. For digitizing analog works, no digital version of the work is available free from technological protections that would prevent the uses authorized in Section 110 (¶ 15).
An ephemeral recording is classified as a recording that is transmitted to enrolled students in a Distance Education environment for a brief period of time, or within a confined span of time. In order for institutions to retain copies of such ephemeral recordings, they must ensure that “such copies are used ‘solely’ for transmissions pursuant to Section 110(2)” (American Library Association, 2003, p. 6), and that “the content (. . .) be placed in storage and outside the reach of students”. This section allows the institution the right to “retrieve that content for future uses consistent with the new law” (American Library Association, 2003, p. 8).

IMPORTANCE OF THE TEACH ACT TO DISTANCE EDUCATORS

The TEACH Act accepts and acknowledges the importance and the power of Distance Education through digital technology. Talab (2003) comments that the Internet is accepted as a means to “transform learning in new and powerful ways”, and the TEACH Act recognizes this fact (p. 6). The TEACH Act appreciates the role that Distance Education plays in educating, and allows exemption from the Copyright Law if, and only if, all provisions and limitations are followed. The DMCA of 1998 did not include provisions related to online learning, and asynchronous learning was not recognized. Talab (2003) adds that in 1998, “there was general agreement among producers and publishers that encryption technology was not sufficient to prevent theft at that time” (p. 6). Since then, better encryption technologies have been developed, thus allowing a more controlled means of reproducing works online. The Federal Government acknowledges and recognizes the essential role Distance Education exercises today.

COMMENTS ON THE TEACH ACT

As a distance learner and educator, the TEACH Act is exceptionally valuable. As a learner, this author comprehends more fully the parameters institutions and educators must follow in order to legally provide learning materials within the online learning environment. The
institutions must be aware of the materials provided and reproduced in all its distance education courses, and must have the means to protect this material from unauthorized reproduction. As an educator, this author realizes the limitations and guidelines an educator has to follow in justifying the use of technological materials online. Based on the TEACH Act’s stipulations, this author realizes that her institution has not provided clear and specific policies to the faculty as a whole, and that some educators within her institution may be violating the law. Although the University of Puerto Rico claims to have a policy regarding the institution’s duties and the author’s rights, this author was unable to access the site’s URL for perusal of such.

Although the TEACH Act is a step in a positive direction, it is the author’s opinion that certain areas of the TEACH Act should be clarified, amplified, or defined. Transmissions of dramatic works are allowed in *reasonable and limited portions* but no definition is given to what a reasonable or limited portion is. What may be reasonable and limited to one educator could be considered unreasonable and not a limited portion to others. How do an educator and an institution determine whether one is reasonable in one’s limitations of reproduced materials? This issue should be clarified in the TEACH Act.

*Small amounts* of materials in textbooks are permissible under the TEACH Act. What exactly are these small amounts? How many pages can an educator rightfully copy? What are the limits? Quantitative limits are not apparent in the TEACH Act and, in the author’s opinion, should be more clearly specified and adequately justified.

Section 112 provides specific stipulations on the reproduction of works for display in a digital environment. It allows the reproduction and transmittal of works for a brief period of time, or within a confined span of time. What does the TEACH Act define as a brief period of
time, or a confined span of time? Is it ten minutes, ten hours, or ten days? The difference is considerable and the Act does not give quantitative measure for determining so.

The TEACH Act provides guidelines in determining whether an institution is eligible for exemption under the Act, and indicates that if an institution believes that it is not complying with the law’s stipulations, it may not enjoy the privileges and rights of its exemptions. In a hypothetical scenario where a nonprofit, appropriately accredited educational institution believes it is complying with the act’s guidelines, how exactly does the institution arrive at this determination? Does the institution request from each distance educator access to all technological material used online in order to assess compliance? On what particular factors is this assessment based? And what about the academic rights and privileges of the distance educator? Are these rights narrowed, channeled, or regulated more rigidly for the distance educator due to the fact that the educator is educating at a distance? Is the distance educator being more closely monitored than the traditional classroom educator, and if so, is this legally permissible? Is the institution’s duty to serve as a law enforcement agency with distance educators, and if so, why is it not required to do so to the same extent with traditional educators as well?

If an institution uses all possible means to protect copyrighted material, and requires authentication tools for enrollment in online courses, is this sufficient and acceptable under the TEACH Act? What exactly is a reasonable means of protecting copyrighted material? There should be a standard to define how far an institution must go, and the acceptable standards for protecting this material.

And, what about an unaccredited educational institution, or a for profit educational institution? Why does this type of institution not have the privileges of the TEACH Act? What is
the justification for their ineligibility to the TEACH Act? The TEACH Act should clarify this limitation and restriction additionally.

CONCLUSION

The Copyright Law of 1976 did not appreciate Distance Education and its potential. The enactment of the TEACH Act recognizes the role Distance Education plays and its growing importance, and acknowledges the use of copyrighted material both synchronously and asynchronously in an online educational environment. With the TEACH Act, educators can reproduce copyrighted materials for use in online classrooms as long as the educator and the institution follow the provisions and conditions listed in the act. Although the TEACH Act is an improvement, it certainly does not sufficiently encompass nor elucidate the full scope of Distance Education, and it does not fully grant the same privileges allowed by the Copyright Law and the DMCA of 1998 for face-to-face educators.

The TEACH Act comprehends education’s evolution from traditional face-to-face classroom settings to include online mediated instructional environments. This progress has by no means ceased, and will continue to thrive because of society’s complex needs. If this environment is to be regulated governmentally, then the government must provide the institutions and the educators with tangible standards that parallel traditional classroom privileges.
References


