

# Balancing Copyright Concerns: The TEACH Act of 2001

The Technology, Education, and Copyright Harmonization (TEACH) Act, under consideration by Congress this past summer, is of vital importance to the higher education community in the digital age.<sup>1</sup> Intended to broaden the current copyright exemption for instructional transmissions and to include distance education by amending the Copyright Act of 1976, the TEACH Act—if enacted—would establish a critical balance between the needs of educators and students on the one side and the rights of copyright holders on the other.

The Copyright Act of 1976 recognized the unique position and importance of education by providing crucial exemptions to the exclusive rights of copyright holders. For example, section 110(1), often called the “classroom exemption,” provides an absolute exemption to the exclusive rights of the copyright holder for performances and displays in the classroom if certain conditions are met. The performance or display (1) must occur in a nonprofit educational institution, (2) must be face-to-face, that is, teachers and students must be present in the same place, (3) must occur in a classroom or similar place devoted to instruction (such as a laboratory or library), and (4) if the work is an audiovisual work, the copy that is performed or displayed must be a lawfully made copy.

Unlike the exemption for face-to-face teaching, however, instructional transmission (i.e., distance education) is not so favored. Section 110(2), which deals with performances and displays in the course



of an instructional transmission, is far more restrictive than the classroom exemption. Although any work may be displayed, performances are limited to non-dramatic literary and musical works. And the displays and performances face a number of limitations. The transmission must be (1) part of the systematic instructional activities of either a nonprofit educational institution or a governmental body, (2) directly related and of material assistance to the teaching content of the transmission, and (3) made primarily for reception in a classroom or other place normally devoted to instruction, or by disabled learners whose condition prevents attendance in a regular classroom, or by government employees as a part of their official duties.

The primary impact of Section 110(2) is that it restricts the types of works that may be performed, a restriction that makes absolutely no sense to teachers. Why should a teacher have to alter the content of a course just because it, or a

portion of it, is offered online or in any distributed fashion? The reason for this restriction is not absolutely clear but appears to have been based on the state of technology in 1976 and the type of distance education courses envisioned at that time. The model seems to have been *Sunrise Semester*, the open television broadcast available on public television.

Also difficult for distance education is the restriction on the place of reception. Although many courses today are still received in a classroom, which meets the requirements of the statute, and although some educators believe that successful distance education courses should have a teacher at the receiving site to direct class discussion, most distance learning courses will be received in the home or in the dormitory room, not in a classroom. Classrooms are likely to lessen as the dominant place for reception as more and more online courses are developed.

Another factor is fair use, a privilege that permits someone other than the copyright owner to reproduce, distribute, adapt, perform, or display a work—in other words, to perform activities that otherwise would be within the exclusive rights of the copyright holder. The example of teaching is mentioned directly in Section 107: “The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or any other means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship or research, is not an infringement of copyright.”<sup>2</sup>

The Copyright Office's *Report on Copyright and Digital Distance Education* unequivocally states that fair use applies even to the use of works not covered by Section 110(2).<sup>3</sup> Rather than being an absolute exemption, however, fair use requires the application of four factors to determine whether a use is fair. First, the *purpose and character of the use* is likely to favor the use when it is for instruction offered by a nonprofit education. Second, the *nature of the copyright work* examines the work itself as it is used. It is unclear under fair use whether works that are produced primarily for the education market should be more or less available for performance in a nonprofit education course. Third, the *amount and substantiality of the portion used* in comparison to the work as a whole indicates that a small portion of a work that is performed in distance education may be permissible, whereas showing the entire work would not be. And fourth, the *market effect* relates to the effect on the potential market for or value of the work. If the institution has purchased or lawfully acquired a copy of the work that it seeks to perform in a distance learning course, there should be no adverse impact on the market. The courts, however, have also looked at the right to license the work for reproduction and performance as a part of the market effect.<sup>4</sup>

The TEACH Act addresses many of these copyright concerns in the context of the digital environment. Based on the *Report on Copyright and Digital Distance Education*,<sup>5</sup> which recommended a number of both statutory and nonstatutory changes concerning distance education, the act represents a significant compromise between copyright holders and education and library associations. As Congressman Howard Berman stated in his testimony before the House Subcommittee on June 27, "certain entities would—for the first time and in admittedly circumscribed circumstances—be allowed to digitize and place online the copyrighted works of others," but this applies in circumstances in which copyright owners have failed to make or decided not to make their works available in digital format.<sup>6</sup> It achieves a balance between expanded online educational use of copyrighted works and their misuse. Education, libraries, and content-provider communities all sup-

port the compromise, which represents a complex set of agreements and inter-related provisions.<sup>7</sup> As in Section 110(2) of the current copyright law, the exemption applies only to nonprofit educational institutions, but TEACH adds a criterion that the institution be accredited or state-licensed for K–12.

The TEACH Act makes five basic changes:

1. It expands the categories of works that can be performed in distance education beyond nondramatic literary and musical works to reasonable and limited portions of other works, with the exception of works produced primarily for the education market.
2. It removes the concept of the physical classroom and recognizes that a student should be able to access the digital content of a course wherever he or she has access to a computer.
3. It allows storage of copyrighted materials on a server to permit asynchronous performances and displays.
4. It permits institutions to digitize works to use in distance education when digital versions do not already exist and when the digital work is not subject to technological protection measures that prevent its use.
5. It clarifies that participants in authorized distance education courses and programs are not liable for infringement for any transient or temporary reproductions that occur through the automatic technical process of digital transmission.

Additional requirements safeguard against unauthorized and inappropriate use of copyrighted materials. The TEACH Act (1) adds a requirement that performances and displays be part of mediated instruction under the supervision of an instructor, (2) limits portions of works to be performed, other than nondramatic literary and musical works, to "reasonable and limited portions," (3) restricts displays to amounts typically displayed in a live classroom setting, (4) limits receipt of materials to enrolled students to the extent technologically necessary, (5) requires the educational institution to apply technological protection measures that reasonably prevent re-

tention of the work for longer than is necessary and that prevent downstream copying or dissemination, and (6) requires performances and displays be given by means of lawfully made or acquired copies of the works.

Enactment of the TEACH Act would go a long way toward facilitating distance learning. The amendment is not perfect for educators, but it does recognize both the needs of educators and students and the concerns of copyright holders, and it strikes a balance between the two. The fact that major education and library organizations support the amendment, as does the Association of American Publishers,<sup>8</sup> indicates that it represents an effective and workable compromise for all interested parties. The rare opportunity afforded by Congress for parties to negotiate and reach compromise has produced this important piece of legislation and restores the notion that publishers and producers on one side and educators and librarians on the other can negotiate and reach agreements on important copyright issues for the digital environment.

#### Notes

1. The Senate passed the TEACH Act (S. 487) on June 7, 2001. At the time of the writing of this column, during the summer adjournment of Congress, the House had not yet voted on the bill, but the House Subcommittee on Courts, the Internet, and Intellectual Property unanimously approved the bill on July 11. For the latest on the legislative status of the TEACH Act, see <<http://www.educause.edu/policy/policy.html>>.
2. 17 U.S.C. § 107 (2000).
3. U.S. Copyright Office, *Report on Copyright and Digital Distance Education* (Washington, D.C.: Government Printing Office, 1999), 161–62.
4. See *American Geophysical Union vs. Texaco*, 60 F.3d 913, 930–31 (2d Cir. 1004).
5. Copyright Office, *Report on Copyright*.
6. *Hearings on S. 487 before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property*, 107th Cong., June 27, 2001 (statement of Congressman Howard L. Berman), <[http://www.house.gov/judiciary/berman\\_062701.htm](http://www.house.gov/judiciary/berman_062701.htm)> (accessed August 23, 2001).
7. *Ibid.* (statement of John C. Vaughn, Executive Vice President, Association of American Universities), <[http://www.house.gov/judiciary/vaughn\\_062701.htm](http://www.house.gov/judiciary/vaughn_062701.htm)> (accessed August 23, 2001).
8. *Ibid.* (statement of Allan R. Adler, Vice President for Legal and Governmental Affairs, Association of American Publishers), <[http://www.house.gov/judiciary/adler\\_062701.htm](http://www.house.gov/judiciary/adler_062701.htm)> (accessed August 23, 2001).



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