November 2013

TEACHing Online: An Update on the TEACH Act

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Recommended Citation
DOI: https://doi.org/10.7771/2380-176X.4157

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With the growing popularity of the Internet, distance education has become an important part of the university. Web-based classes now allow students to learn where they want and when they want, overcoming geographic and social boundaries to obtain an education. Yet sometimes technology advances faster than the law can keep up. Copyright law is one area where technology allows us to do things that are not permitted. The TEACH Act is an attempt to catch up.

There are several sections of the copyright law that are relevant for education, including the library exceptions in section 108. However, most important provisions are Fair Use and the Public Performance exception. The Fair Use provisions are found in section 107 and the Public Performance exception for education is contained in section 110. The TEACH Act modernizes section 110 to bring it into harmonization with the growing trend toward distance education. I wrote about the TEACH Act in my Legally Speaking column “Copyright and Distance Education,” located on pages 68-70 of the September 2001 issue of Against the Grain. At that time, the TEACH Act had been passed by the Senate, but not by the House. Because the act has now become law, it is important to revisit the act in order to discuss implications that were not apparent when it was proposed.

Copyright and Fair Use

Copyright grants many rights to the copyright holder, including the rights to control reproductions and public performances. This is an issue in distance education because each time an item is viewed on a computer a copy is made. If the item is in the public domain, this isn’t an issue; however, with newer items the teacher needs to make sure that he or she is in compliance with the law.

In order to determine how long copyright lasts, there are three questions you have to ask. These questions are:

1. When was the material created?
2. Was the material created by a personal author or a corporate author?
3. (If a personal author) when did the author die?

Because of changes in copyright law over time, it is important to find out when the material was created. The chart below gives a brief overview of the duration of copyright law.

<table>
<thead>
<tr>
<th></th>
<th>Created before December 31, 1922</th>
<th>Created between January 1, 1923 and December 31, 1977</th>
<th>Created after January 1, 1978</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Author</td>
<td>In the Public Domain</td>
<td>95 years</td>
<td>70 years</td>
</tr>
<tr>
<td>Corporate Author</td>
<td>In the Public Domain</td>
<td>120 years</td>
<td>95 years</td>
</tr>
</tbody>
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Copyrighted material can only be used if it falls within one of the statutory exceptions. The most important exception prior to the passage of the TEACH Act was Fair Use. Fair Use was the subject of my Legally Speaking column “Fair Use and the Common Law of Copyrights,” which was published in the February 2002 issue of Against the Grain, pp. 60-63. Here is a quick primer on the basic principles of Fair Use.

Section 107 states that “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” [Emphasis added]

Some of the factors for Fair Use include:

- What is the character of the use?
- What is the nature of the work to be used?
- How much of the work will you use?
- What effect would this use have on the market for the original or for permissions if the use were widespread?

Basically, using a small amount of work for non-profit educational use is permitted. It is the Fair Use provision of section 107 that allows teachers to make copies of articles for their students. This is a very important provision for traditional education, but it also has implications for distance education because of the unique nature of computers. Every time you view an article on the computer, you are making a copy of it, which is a potential problem under copyright law. In fact, this is one of the big issues in the legal protection of digital information. Luckily, however, the Fair Use exception under section 107 applies to this situation, allowing faculty members to do online most of what they can do in the classroom.

The TEACH Act and Transmission of Performances

The other important provision in copyright law is the Public Performance Exception contained in section 110. Under copyright law, public performance of a work is subject to copyright restrictions. However, educational institutions receive certain exceptions. According to section 110(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...”

Interpretations of the term “Similar place devoted to instruction” generally includes libraries, auditoriums, etc. This exception only applies if performance comes from a legal copy, and any copies are legally made. Section 110(1) is the part of the copyright law that allows universities to show and discuss films, musical recordings, etc. However, it does not apply to transmission for distance education.

The TEACH Act was created because the old exception for educational transmission of performances in section 110(2) was very restrictive. Under the old law, educators could only transmit non-dramatic literary or musical works if one of the following conditions applied:

1. The performance was received in classrooms or similar places normally devoted to instruction;
2. The performance was received by persons with disabilities or other special circumstances that prevent their attendance in classrooms; or
3. The reception was by officers or employees of governmental bodies as a part of their official duties or employment.

As you can see, there are several problems with the old rules. Section 110(2) allowed educational broadcasts of copyrighted materials to remote classrooms, but not to homes, offices, and other places where distance education students may be. Distance education programs could not do the same things as face-to-face classes. In order to rectify this problem, Congress passed the TEACH Act.

The acronym TEACH Act stands for the “Technology, Education, and Copyright Harmonization Act.” The original bill was proposed by Senators Hatch and Leahy in April 2001 (Senate Bill 487). Unlike most legislative acts, this bill was a negotiated agreement from the very start.

Distance Education is an issue that is very important to Senators Hatch and Leahy. Senator Hatch was the majority leader of the Senate Judiciary Committee, and Senator Leahy was the minority leader. In April and May 2001, the two senators convened a meeting of all the interested parties in order to come to an agreement that would fix the problems with section 110. The group represented publishers, educators, computer professionals, and copyright attorneys. The group came to an agreement on May 4, 2001. The text of the Senate bill constituted the agreed-upon terms that were negotiated. Although the Senate quickly passed the bill, it remained buried in the House for quite some time.

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Finally, the House passed the bill, and it was signed into law on November 2, 2002.

What the TEACH Act covers

The TEACH Act applies to “the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work [and to the] display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.” This means that distance educators can use commercial works, as long as they are “reasonable and limited.” The best way to determine that is to look at the principles of Fair Use.

The TEACH Act amends Section 110(2) to eliminate the “face-to-face” requirement of the educational performance exception. The new exception is available only to accredited non-profit educational institutions, and the performance must only be received by enrolled students. In order to avoid problems, the act defines accredited institutions: “Accreditation for post-secondary institutions shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.”

The act only applies to non-profit educational institutions. This means that for-profit institutions such as the University of Phoenix are not covered by the TEACH Act. The exception of for-profit institutions was a key demand of the content owners. After all, these institutions are set up to obtain a profit for their owners and stockholders. Since businesses and companies are not permitted to transmit copyrighted material, it makes sense that a for-profit educational institution would not be either. These institutions can only transmit materials if they obtain a valid license from the copyright holder.

In order for the TEACH Act to apply, the transmission must be “[n]ade by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session.” The class must be a “regular part of the systemmatic mediated instructional activities,” and the transmission must be received by students officially enrolled in the course for which the transmission is made or governmental employees in the course of their duties. In other words, for educators to use a performance, it must be related to the content of a for-credit course.

One important part of the TEACH Act concerns the responsibilities that are laid upon the institutions. The exception only applies if the school creates and maintains policies regarding copyright. The school must provide educational sessions and informational material that explain copyright. There must also be a notice to students that materials used in connection with the course may be subject to copyright protection.

The schools also have certain responsibilities for the transmissions under the TEACH Act. There must be technology in place to reasonably prevent students from retaining the work for longer than the class session, and the technology must not allow students to pass on the work to others. In addition, the institution must not interfere with technological measures used by copyright owners to prevent retention or unauthorized further dissemination.

There are several categories of works that are excluded by the TEACH Act. This includes works that are marketed “primarily for performance or display as part of mediated instructional activities transmitted via a digital network.” This makes sense, since otherwise these kinds of instructional works would be effectively unprotected. The TEACH Act also excludes performance or display of copies “not lawfully made and acquired,” since it would not serve the public purpose to reward people for violating copyright.

Under the act, it is possible for faculty members to convert analog works to digital formats under certain circumstances. For example, a performance that is contained on a VHS tape could be digitized for transmission provided that the digital version is not available, or if the digital version is secured by a technological measure that prevents use in distance education. You may not convert more than you would be allowed to transmit under Section 110(2).

One issue that is not specifically addressed by the law concerns handouts and other types of readings. Although this issue is not covered in the act, according to Kenneth Crews the provision on display in quantity similar to the live classroom would suggest that occasional, brief handouts—perhaps including entire short works—may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the new law.

Crews’ interpretation is also based on the Fair Use provisions in Section 107 that relate to multiple copies for classroom use. Fair Use provisions apply to handouts and other types of materials you use in class. According to Intellectual Property expert David Lange, Fair Use still applies to transmissions, even in the absence of the TEACH Act. Of course, in order to be protected, you should not use more materials in either an in-person class or a distance education class than Fair Use allows. However, it appears that you can do the same things with handouts in a distance education class that you would be able to do in a face-to-face class.

Conclusion

The TEACH Act is an attempt to bring copyright law into harmonization with the technological and social advances of distance education. The act amends section 110(2) of the copyright law to allow “reasonable and limited” portions of performances to be transmitted via technological means to distance education students.

In order to use the distance education exception contained in the TEACH Act, educators must do the following:

- Transmit only legal copies of non-dramatic, literary, or musical works (or reasonable portions of other works)
- Transmit only to classes you teach as part of the university’s curriculum.

Ameliorating the Effects...

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formality, or it might be determined that formalities apply only to the initial acquisition of the copyright by the author/creator. But Berne requires only a minimum fifty-year standard, so it may be permissible to require registration of the work for the term beyond the fifty years.

Conclusion

With no published work entering the public domain before the end of 2018, the concern about the vitality of the public domain is real. This article has discussed some proposals as well as § 108(h), which will help to ameliorate the effects of this twenty-year extension of the term of copyright. Since digital works can remain available indefinitely with little storage charge, these works may always be viable commercially, but it is not clear that there will be any demand for them. Perhaps public demand should be the key issue as opposed to potential commercial exploitation.

A remaining concern is whether copyright owners will again push for an extension of the term of copyright as the year 2018 approaches. If so, let us hope that we find a way to deal with this and exempt works for which there is little public demand. Otherwise, copyright protection has the potential to become perpetual due to repeated extensions of the term for existing works. If this happens, then libraries and their users, scholars and researchers will be the losers once again in the attempt to balance the rights of users with those of copyright owners.

Endnotes

2. 17 U.S.C. Section 110(1).
3. Old Title 17 U.S. Code Section 110(2).
4. I attended the conference “Intellectual Property in the Digital Age,” held at the University of Wisconsin on May 6-8, 2001. This conference took place two days after the agreement was made. Most of the participants in the negotiation attended this conference, and the historic agreement was one of the biggest topics.
5. 17 U.S.C. Section 110(2).
6. Based on this provision of the law, I have the following notice posted on the front page of my online library science course: “The course and its components are copyright 2001-2003 Bryan M. Carson. This course also makes legal use of some copyrighted materials pursuant to Title 17 U.S.C. Sections 107 and 110. Copyrighted materials may not be reproduced without permission by the copyright holder.”
7. This is a reference to the Digital Millennium Copyright Act, 17 U.S.C. Section 1201 et. seq.

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Interview with Andrejs Alferovs
Vice, President, Sales and Marketing
Cou/ts Library Services

by Jack G. Montgomery (Editor, ATG) <jack.montgomery@wk.edu>

ATG: Andrejs, I understand that you’re new to Coutts North America. Tell us a little about yourself.

AA: At the ALA/CLA I attended the WESS meeting to present the Coutts Nijhoff award. It was the first time that I had been to a gathering where most of the delegates knew my background from my name and I must say that this is a tribute to the members of WESS. Well, they were almost right. I was born in England but both my parents came from Latvia at the end of the second World War. They actually met in Bradford. I was born and raised as a Latvian in the U.K., going to Latvian school on a Saturday, learning the language, history and culture. It was pointed out by members of WESS that my accent was not very Latvian. That is because I was brought up as part of that little known tribe, the Yorkshire Latvian.

In many ways I am typical Brit — I like warm beer, real football (soccer) and rugby. I am starting slowly to receive my North American sports education. But having arrived in the Niagara region in early January during one of the coldest spells in recent history, I have had very few opportunities to sample outdoor sporting life, but hopefully this will arrive during the summer.

I realize that it sounds a little cliché, but I have always had a love of books — my education was definitely more on the side of the arts. As a typical arts graduate, one had to think about employment and when I saw the advertisement to work in the Slavonic Section at the British Library I thought that this would be for me. So I started my career at the British Library Document Supply Center working in various departments including both serial and monograph acquisitions.

ATG: Tell us a little about your position at Coutts? What if any specialized training or education did you receive before getting into the book business?

AA: It really has been a progression of experience and education. The British Library gave me my start and during this time I gained a post-graduate Diploma in Librarianship and Information Work (a sort of MLS equivalent of its time). In my final post at the BL, I worked in Monograph Acquisitions and it was there that I was offered a post as Area Sales Representative for Holmes MacDougall, a U.K. Library bookseller, with a core client base in the public library sector.

From there I moved into publishing with HarperCollins, where I spent five years working in sales and looking after key accounts in wholesale and library supply. Working with HarperCollins gave me very sound sales training — in a very tough and highly competitive environment. They had numerous restructurings during my time there, not least when Rupert Murdoch merged Collins and Harper and Row — in many ways this gave the taste of things to come in the publishing and library supply industries during the 1990’s.

I suppose I never really wanted to leave the library world, despite some of the glamour of general trade publishing. However, I could not resist the draw when I decided to join Faxon to run their fledgling operation in the U.K. During this time the company sponsored my Diploma in Company Direction. However, the company was to remain fledgling despite our hardest efforts as the European Division was sold off in 1994 to SwetsBlackwell.

It was at this time that the Managing Director of a young British company, BMBC, approached me to run their sales operation. The business developed quite rapidly during a dramatically changing bookselling landscape in the mic 1990’s, especially with the impact of the collapse of the Net book agreement in the U.K. I was appointed to the Board in 1996.

ATG: Can you tell us a little bit about the company’s history and its overall philosophy?

AA: The Coutts Group has evolved from the merging of four companies. John Coutts Library Services in the U.S.A and Canada, the

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Don’t put it on your open Website; use course management software that will authenticate the student.

Make sure only students that are registered in your class (or grad assistants) can access course material.

Show the performance only for a limited time period.

Make sure students can’t copy, download, or pass on to others.

Inform students that material is copyrighted.

Follow university rules.

Distance education holds the power to change lives by eliminating many of the social and geographical barriers to higher education. With the recent changes in copyright law, distance educators can finally do the same things via course management software that they can do in a traditional classroom. With these changes, the promise of distance education can finally be fulfilled.

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