Reform School for the Teach Act 110 (2)
From Serpentine and Unwieldy to Clear and Enforceable

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Introduction

Signed into Law on November 2, 2002, the Technology, Education, and Copyright Harmonization **(TEACH)** Act was a product of discussion and negotiation among academic institutions, publishers, library organizations and Congress. It sought to offer many improvements over previous regulations. Specifically, the act amended sections 110(2) and 112(f) of the U.S. Copyright Act. In its negotiated committee origins, it tried to satisfy all sides concerned. From this origin looking back, it has created more challenges than solutions or a clear path for copyright law. Ironically perhaps, The Teach Act has satisfied few sides concerned and caused difficulty and frustration in both enforcement and application (1).

As presently composed, the Teach Act 110(2) is difficult, sinuous and winding in language with arcane exceptions, antiquated vocabulary and multiple loopholes which have created a series of challenges for enforcement, interpretation and litigation (2). It is definitely not a pragmatically useful act for educational, business or legal institutions. Increasingly, in the digital age and new millennia, its pragmatic use also opens a Pandora's Box of thorny copyright ambiguities for lawyers, librarians, educational administrators, faculty and business-interests alike. Its serpentine shifting mercurial nature also provides a

thick morass of open-to-interpretation “ifs”, “ands” or “buts” obfuscating language, the law and perhaps even playing a part in eroding copyright legitimacy for the new millennia.

This paper describes how the Teach Act could be radically revised. Amending the Teach Act 110(2) is necessary to create a linguistically elegant but also enforceable document and implement a clear win/win situation for parties on all sides. Educational institutions and business are vitally interested in enforcing this act but in its present form this has become an untenable challenge.

A Proposed New Teach Act

The original Teach Act in its entirety has been included as a footnote at the end of this document (3) for review. The below Teach Act revision contains the full-text of the proposed new clear language amendments:

Educational Use Copyright Exemption 110(2) Proposed Revision

The use of copyright work is allowed transmission through digital learning environments, if:

(A) use is part of a class;
(B) use relates to teaching;
(C) reception is limited to course-enrolled students
(D) the institution provides notice of copyright materials and reasonably prevents unauthorized dissemination.

The remainder of this paper will now present an extended clarification discussing how the current Teach Act was amended and why this more terse revision above is being forwarded to revise the act to be more enforceable and useful for all interests involved.

I

The Teach Act begins with a long and muddy exception which serves if anything to throw any interpreter off-balance and into a judicial morass:

> except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if –

The language here in the present form for pragmatic purposes is unreadable. This opening is eliminated in favor of a more general encompassing introduction and first part of a conditional statement:

"The use of copyright work is allowed transmission through digital learning environments, if . . .

The revision clarifies the purpose of 110(2) and sets the stage for the specific conditions to follow. Further, the whole previous large set of gnomic rudimentary taxonomical distinctions made between types of educational institutions are eliminated in favor of simply 'digital learning environments'. This serves to shift emphasis from the previous crude and non-inclusive "accredited nonprofit educational institution" and sets the future stage. Educational environments are included in a widening of definition to let this be argued in

court later if necessary. 'Digital learning environments' also allow the emphasis to shift with a more forward thinking or weighted trajectory and opens room for conditions A-D.

Similarly, fuzzy distinctions between 'performances' and 'displays', 'phonorecords' and 'copies', 'nondramatic literary' or 'musical' works are also eliminated in favor of the more general encompassing 'copyright work'. Again, this allows a clear-cut distinction for later work up for contestation for educational institutions and business interests and cuts through a thorny morass of out-of-date taxonomic distinctions to begin with the heart of the Teach Act and larger purposes of the exemption.

II

Section 110(2) A in its present form reads:

> (A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

This is more tersely replaced by:

"(A) use is part of a class."

Again, there is no reason to quibble over areas better argued in court. The Teach Act hopefully does not to evolve in the same trajectory as the tax code and its evolution in this direction should be nipped in the bud. If there is to be a Teach Act, this should cover distance education in an increasingly global democracy. If not, an exemption should not

exist. It is important to remember the larger original purposes of the Act here to allow educational institutions a fair use exception with regards to materials and the progression of distance teaching and learning.

III

Sections 110(2)B and 110(2)C here again are unnecessarily opaque. The language currently reads:

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;
(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to —
(i) students officially enrolled in the course for which the transmission is made; or
(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

Clarifying, the language would be amended:

(B) use relates to teaching;
(C) reception is limited to enrolled students

In the latter simplification, contested points can be more easily argued by all parties. Disputes can also be more easily settled when there is a clear definition and violation either of material used unrelated to teaching content or transmitting to un-enrolled students. Why play verbal gymnastics *a priori* or try to second guess future debates into law? A simple statement protects all parties involved. It also provides room for the later court and judicial bodies as necessary.

IV

Finally, witness the winding impenetrability of subsection 110(2) D:

> D) the transmitting body or institution —
> (i) 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; and
> (ii) in the case of digital transmissions —
> (I) applies technological measures that reasonably prevent —
> (aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and
> (bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and
> (II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

This would be replaced by:

(D) the institution provides notice of copyright materials and reasonably prevents unauthorized dissemination.

The large idea here is to provide a general umbrella statement that becomes enforceable and defensible. The main two features of 110(2) D are left intact. The condition provides notice that materials are under copyright and applies strictures that reasonably prevent unauthorized dissemination. All other 'ifs', 'ands' or 'buts' are eliminated. These are better argued in court. It is left to the judge to enforce and lawyers to interpret violations or infringements with at the least a more simple, elegant but also powerful instrument.

As previously written, subsection 110(d) attempts an interpretation of the larger features of the Teach Act rather than guiding principles to move forward. It has become unenforceable in its unnecessary ambiguous twists and turns. Let the forces play out in court if with at least a clear set of guidelines over which to joust.

Conclusion

The various opposing interests that originally drafted the Teach Act sought for conciliation and equilibrium among interests of education, business and the marketplace to provide an exemption that could satisfy all involved and provide protection for distance education and the marketplace within democracy. The initial result though was an Act that satisfied no one. The act currently serves to obfuscate law for the digital era. What is clear is that a deterrent or enforceable guideline is difficult to find and the law becomes a copy for various whiter shades of pale.

There are larger lessons to be learned. These go beyond the Teach Act. A Teach Act exemption should be present for educational institutions to preserve the vitality of the present and future democracy. The present revision seeks to redress previous well-meaning arbitration by keeping fractious debates out. The law should be pragmatically enforceable and valid foundation going into the future. A more healthy, vital and clear Teach act should be understandable and enforceable by at least a few communities. All primary and secondary parties involved in its enforcement should be concerned. Even if this version is not approved, reform school is needed for the Teach Act, for future litigation but perhaps more importantly for digital- related judiciary and intellectual property concerns in the new millennia (4).

Footnotes

1) For recent educational media coverage see: Kolowich, Steve. “Hitting Pause on Class Videos” *Inside Higher Ed.*, January 26, 2010 and --. “Stream Away” Inside Higher Ed. October 5, 2011

2) For recent judicial filings see Association for Information Media and Equipment et. al. v. The Regents of the University of California et. al., No. CV 10-9378 CBM (MANx). (C.D. CA 2011). AIME v. UCLA – Doc. 19: UCLA Case Amended Complaint. AIME v. UCLA--Doc. 34: Order Granting Defendant's Motion to Dismiss. AIME v. UCLA -- Doc. 38: Second Amended Complaint.

3) The Teach Act. Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code, Circular 92. Chapter 1: Subject Matter and Scope of Copyright.**,** Section 110: Limitations on Exclusive Rights: Exemption of Certain Performances and Displays. Cited from http://www.copyright.gov/title17/92chap1.html#110, Retrieved October, 28, 2011.

The Teach Act 110 (2)

110(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if —

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to —

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution —

(i) 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; and

(ii) in the case of digital transmissions —

(I) applies technological measures that reasonably prevent —

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

112(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if —

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if —

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

4) A broader discussion of the need to reform copyright for education in the new millennia is contained from different perspectives in recent *Chronicles of Higher Education*. See Hyde, Lewis. “How to Reform Copyright. *Chronicle of Higher Education*. October 9, 2011 and Special Section: “The Copyright Rebellion”, *Chronicle of Higher Education*, June 3 2011.