

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

Ray Uzwyshyn, Ph.D. MLIS, Director of Libraries
American Public University System

Introduction

Signed into Law November 2, 2002, the Technology, Education, and Copyright Harmonization (**TEACH**) Act was a product of negotiation among academic institutions, publishers, library organizations and Congress. It sought to offer improvement over previous regulation. Specifically, the act amended sections 110(2) and 112(f) of the U.S. Copyright Act. Looking back, it has created more challenges than solutions satisfying few sides and causing difficulty in enforcement and application.

As presently composed, the Teach Act 110(2) is linguistically sinuous with arcane exceptions, antiquated vocabulary and interpretative challenges for litigation. It is not a pragmatically useful act for libraries, educational or legal institutions and its use opens a Pandora's Box of digital copyright ambiguities for lawyers, librarians, faculty and market-interests. Its mercurial nature also provides a morass of open-to-interpretation "ifs", "ands" or "buts" eroding new millennia copyright understanding.

This article describes how the Teach Act could be revised. Amending the Teach Act 110(2) is necessary to create an enforceable document. Educational institutions and business are vitally interested in enforcing this act. In present form this has become a challenge.

A Proposed New Teach Act 110(2)

A reference for the original Teach Act in its entirety has been included as a sidebar. The below revision contains the full-text of a proposed new clear language revision.

Educational Use Copyright Exemption 110(2) Proposed Revision

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.

Now, how was the current Teach Act specifically amended and why the terse revision?

The current Teach Act begins with a muddy exception:

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 –

This opening is eliminated in favor of:

“Use of copyright work is allowed transmission through digital learning environments, if . . .

The revision clarifies 110(2)'s purpose and sets the stage for further conditions. Previous rudimentary distinctions are eliminated in favor of ‘digital learning environments’ and conditions (A-D). Fuzzy distinctions between ‘performances’ and ‘displays’, ‘phonorecords’ and ‘copies’, ‘nondramatic literary’ or ‘musical’ works are also eliminated in favor of the clearly defined ‘copyright work’.

Section 110(2) A in 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 replaced by:

“(A) use is part of a class.”

Again, there is little reason to quibble. If there is to be a Teach Act, this should cover distance education. Similarly, sections 110(2)B and 110(2)C 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

This is amended:

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

Disputes can be more easily settled with a clear definition. Why play verbal gymnastics or second guess future debate? A simple statement protects all parties and provides room for later judicial bodies.

Finally, 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 is replaced by:

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

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' with a simple, elegant but more powerful instrument for all.

Conclusion

The various interests that originally drafted the Teach Act sought for conciliation, protection and equilibrium between education and the marketplace. Currently, enforceable guidelines are difficult to find. A Teach Act Exemption should be present for academic libraries and educational institutions. The law should be pragmatically enforceable and understandable. Even if this version is not the one, reform school is needed for the Teach Act, for libraries, for litigation but perhaps more importantly for digital-related judiciary and intellectual property concerns in the new millennia.

Side Bar I

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 governmental 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;

The Teach Act. Copyright Law of the United States of America and Related Laws.

<http://www.copyright.gov/title17/92chap1.html#110>, See also 112(f) for full addendum. Retrieved October, 28, 2011.

Sidebar II: Teach Act: Recent Cases and Further Links

Kolowich, Steve. "[Hitting Pause on Class Videos](#)" *Inside Higher Ed.*, January 26, 2010 and --. "[Stream Away](#)" *Inside Higher Ed.* October 5, 2011

Recent Judicial Filings. 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.

Chronicles of Higher Education. See Hyde, Lewis. "How to Reform Copyright." *Chronicle of Higher Education.* October 9, 2011. Special Section: "The Copyright Rebellion", *Chronicle of Higher Education*, June 3 2011.

American Library Association Distance Education and the Teach Act Site.

<http://www.ala.org/ala/issuesadvocacy/copyright/teachact/index.cfm>