

## On copyright

# Copyright in a networked world: digital distance education

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### Keywords

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### Abstract

Internet-based distance education has become big business for both universities and the commercial world. The new TEACH Act was intended to make US copyright law friendlier toward Internet-based distance education. In fact it hedges the privileges it grants with a host of exclusions and restrictions. The Act's promotion of technological protections could have international consequences that further restrict access to digital works.

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## Distance education

The 1976 US copyright law included provisions for distance education as practiced at the time:

... the following are not infringements of copyright

... (2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if (A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and (C) the transmission is made primarily for (i) reception in classrooms or similar places normally devoted to instruction ...

(17 USC 110 (2) [pre-2002]).

The phrase about "reception in classrooms" was not a problem at a time when distance education consisted mainly of a TV camera telecasting a person in one room speaking simultaneously to groups of students sitting in other rooms some distance away. The law did not actually require simultaneity, but implicit in the classroom setting clause was a notion that the teaching took place during a fixed time period in a fixed location.

Contemporary Internet-based distance education makes a point of letting students learn when they want and where they want. It deliberately dissolves the classroom and integrates the teaching experience into the whole learning environment, so that the teacher's presence (once limited to the classroom) can intrude into the exercises, the background reading, and the student-to-student interactions. In other words, it creates a virtual environment where time and space matter only at the final moment when grades are due.

The old distance education exemption in the copyright law obviously did not fit this situation. Some institutions required distance education faculty to get permissions for everything. Others hoped that the copyright infringements in their distance education programs would remain undetected behind the stealth-screen of password protection, and mostly they have.



## TEACH Act

The TEACH Act failed its first time through Congress, but slipped through later as part of a spending bill that President Bush signed into law on 2 November 2002. The intent of the Act was to modernize section 110 so that it applied to an Internet-based distance education environment. It erased the old paragraph 2 and started over.

The old paragraph 2 had 132 words. The new paragraph has 728, five and a half times as many, which is one reason why many of academe's best copyright lawyers readily admit that they are not completely sure what it means.

In the words of Kenneth Crews (2002): "The statutory language is itself often convoluted and does not flow gracefully."

A leitmotiv of the Act is its negativity. The first phrase, for example, excludes works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks ..." The syntactic implication is that this exclusion matters more than what the TEACH Act enables.

The key enabling phrase of the Act strongly resembles that of the earlier version:

... 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 with that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, ... (TEACH Act, 2002).

The sequent if-clause contains 262 of the 728 words (about 36 per cent) and includes a long list of specific requirements. The majority of the Act describes what is not allowed, rather than what is.

### Non-technological requirements

Some of the requirements specify which institutions qualify for the Act's exemptions. This set is fairly standard, and includes any "governmental body or an accredited nonprofit educational institution."

Other requirements may seem equally standard, but have unexpectedly long explanations. An example is the standard requirement that "the performance or display is made by, at the direction of, or under the actual supervision of an instructor," and it must be

"an integral part of a class session offered as a regular part of the systematic mediated instructional activities." The Act goes on to narrow the meaning:

The term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting ... (TEACH Act, 2002).

And then to make matters even clearer, the Act adds an anti-definition:

The term does not refer to activities that use, in one or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use (TEACH Act, 2002).

These definitions total 137 words or about 19 per cent of the Act.

One important word that the Act does not define is "session". A class session has specific temporal boundaries in face-to-face teaching, such as: Tuesday, Thursday, 10:00-12:00. Internet-based distance education deliberately erases those boundaries, so that a student can attend any class session at any time during the semester. The unanswered question is whether a session can equal a whole semester.

The authors of the Act seem skeptical about the willingness of faculty and perhaps even institutions to comply with the law. They included a clause requiring that a qualifying 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 ... (TEACH Act, 2002).

This is essentially a law requiring that people be told to follow the law, and shows some measure of the gulf between the copyright statutes and public attitudes about what really represents infringement.

### Technological requirements

The technology requirements of the Act are extensive and as vague as the definition of “mediated instruction” is (or seems) specific:

(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 . . . (TEACH Act, 2002).

No interpretation of the phrase “technologically feasible” is included, nor even a hint whether feasibility requires cutting-edge developments or suffices with what a small college could implement on its own.

Limiting access is the theme of another sentence:

No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients.

Here the unclear phrase is “ordinarily accessible.” Are passwords sufficient? For some institutions with weak security, “ordinarily” might imply a considerable openness.

Institutions are notoriously slow about deleting old, unneeded files from disk space and tend not to update access rules until the next semester (partly because of students with incompletes). The TEACH Act requires a change of behavior:

No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

This sentence not only repeats “ordinarily accessible” but adds the equally vague phrase “reasonably necessary.” Only the courts will be able to decide what this means.

The strictest requirements could force institutions to take an active role in applying technological protections:

the transmitting body or institution . . . (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; . . .

Section (bb) in particular not only would be difficult for most institutions to implement, but would mean applying protections that most find odious and invasive. One student lending a book to another has long been possible. One student lending a digitally protected reading to another could now involve the student in a criminal action.

One last clause removes any question that the TEACH Act might undo the provisions in the Digital Millennium Copyright Act (DMCA) that prevent interference with technological measures:

(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 Act authorizing making copies of analog materials instead of using their digital equivalents, when that would mean contravening DMCA protections:

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except . . . 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).

For a fuller analysis of the Act’s technical requirements, see Crews (2003).

### Consequences for libraries

The intention of the TEACH Act seems to be to create a limited, loophole-free form of distance education by emphasizing what cannot be done. This negative approach undercuts the Act’s implicit good intentions and bodes ill for future educational exemptions.

The most immediate consequence of the TEACH Act for US libraries may come from the need to provide electronic reserves for distance education classes. The Act does not require e-reserves *per se*, but they represent a formal way of separating outside reading from mediated instruction, which could be important in any legal action. If outside readings are

jumbled in with instructional sections, as is often the case now, it could become harder to argue that a clear distinction has been made, as required by the law. Many faculty may, however, feel the exact opposite: that a fuzzy boundary between background readings and mediate instruction gives them the chance to use more works without getting a permission. While each institution will need to decide, the more risk-averse are likely to prefer an approach that implies a clear-cut good faith effort at making the required distinction.

A second consequence will be the need to implement the technology necessary to satisfy the Act's requirements. Even if parent institutions provide the technology, libraries may have to apply it to materials they supply to distance education courses. Electronic reserves could also be affected. Since most e-reserve systems come from vendors, the technical problems will be theirs to solve.

The most troubling consequence comes from the Act's implicit promotion of technical protections to hinder copying. Once these protections become available, the vendors of full-text articles will be tempted both to adopt them and to require libraries to accept them. The protections will further undercut any hope libraries might have of reviving parts of the first sale doctrine that gives them the right to lend or sell legally purchased copies. Such hopes were probably unrealistic anyway.

The Act also requires institutions to take a more active effort at promoting copyright compliance. Libraries in general do comply with the copyright law, and have long had warning signs over their copy machines. Libraries have also been in the forefront of

lobbying efforts against technological protection measures that the Act will now force them to persuade others to accept. This situation is familiar in any law-abiding democratic society where legislatures do not vote as librarians desire. Nonetheless it will rankle.

For non-US libraries, the TEACH Act matters mainly through its promotion of technological protections. It seems likely that vendors will want to adopt these protections world-wide, and that legislators in other major intellectual-property producing countries will agree.

The TEACH Act is still too new for any but the most speculative judgments, and some of these consequences may not happen. One judgment seems, however, likely to endure: the disappointment felt by many of the faculty and librarians who had initially looked forward to the TEACH Act as a boon for distance education.

## References

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