

# Why the Technology, Education and Copyright Harmonization Act Matters to Librarians: Two Cheers for the TEACH Act

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**ABSTRACT.** Librarians with an interest in electronic reserves were, for the most part, disappointed by The Technology, Education and Copyright Harmonization Act (TEACH Act). The Act provided classroom instructors with relatively clear guidelines as how they could use copyrighted materials online classes without violating the law. Mention of libraries, however, was conspicuously absent and the Act offered no direct guidance for what sort of library materials could be placed on the Internet. The guidance it offers though is more indirect. It gives some sense of how the legislative branch views the rights and responsibilities of educators in the use of online materials. It will offer guidance to the judiciary when, inevitably, a copyright dispute involving electronic reserves ever goes to court. It is important that librarians understand the TEACH Act and what it means to education. doi:10.1300/J474v18n01\_06 [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2007 by The Haworth Press. All rights reserved.]

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### ***THE INTENT OF THE TEACH ACT***

The Technology, Education and Copyright Harmonization Act (TEACH Act) was essentially an extension of Fair Use. It was established to help educators use copyrighted material in the digital environment without the difficulty and expense of seeking permission. For educators who used the Internet as a teaching tool, this was a welcome development. Lawmakers had been slow to recognize how digital technology had rendered existing copyright law obsolete. When they did take action, the primary beneficiaries had been content owners. With the TEACH Act, Congress had recognized the rights of consumers as well. Libraries, working with electronic reserves were disappointed. The TEACH Act fails to take into account the concerns of electronic reserve programs. It specifically ignores them. Still, there are compelling reasons for those involved in electronic reserves to become familiar with the details of the TEACH Act. The Act clarifies and reinforces rights and privileges claimed by educators but never spelled out in law. The TEACH Act provides a better idea of the limitations of Fair Use, and what rights educational institutions have when reproducing and redistributing copyrighted material for class room use.

The impetus for the TEACH Act evolved from the growth in distance education. Lawmakers cited the needs of students in isolated rural communities. The true beneficiaries have been non-traditional students. These are mostly older individuals seeking post-graduate degrees to augment their skills or make a career change. The demographic indicates that these individuals tend to have career or family obligations that traditional four year college students do not (Jenkins and Downs, pp. 218-219). They do not have time to devote to travel, scheduled daytime class periods and library research during normal business hours. For them, the ability to attend lectures, participate in class discussions and access assignments over the Internet has made attaining a degree an easier and more realistic option. At the same time, a new generation of undergraduates has arrived on campus. They have grown up with personal computers, the Internet and the World Wide Web as an integral part of their lives. They are accustomed to using these technologies as more than just research tools, but as a means of communication. This group also wants the convenience and

efficiency that online resources and twenty-four hour access offered. Many administrators and faculty also recognized the value of online media as a teaching and research tool.

### ***THE BACKGROUND TO THE TEACH ACT***

There are a number of obstacles. Many of them involve technological and legal issues. More traditional concerns, related to implementation, are costs and supporting resources. Once the initial startup costs were paid, universities must deal with regular operating expenses. One of these, often overlooked, expenses is seeking, and often paying, for copyright compliance. Not only paying the copyright holder, but the labor and time involved in finding, contacting the person or corporation to secure permission. For some schools, this represents the single greatest expense incurred for distance education programs. [Young, p. A35, also see Hafner, p. 1]. The only hope for educators is to seek, or assume an exception for the library from the burden of the regulations. Fortunately, there is a precedent for an exception.

The 1976 Copyright Act had given teachers in the classroom certain exemptions from restrictions on the use of copyrighted material. The instructor could screen a film, play music or read from a play without it being considered a "public performance." According to the law, all the Teach Act was required to do was to be able to, reasonably, demonstrate that the work was relevant to the course (previous law: 17 U.S.C. 110(2) (A)). If the school had access to a closed circuit television system, material could be transmitted from one fixed location to another, provided it was not broadcasted over publicly accessible cable channels or the airwaves.

It was never clear if these privileges applied to the growing number of online or distance education courses in the digital environment. Many institutions assumed that it does without the necessary legal support. The 1976 law did not envision or mention any technological change beyond the existing analog forms of transmission. The online classroom is very different from its physical counterpart. Students do not gather at a fixed place or time, instead visiting a website at a time convenient to them and staying as long as they wish. The various digital formats were problematic because some could be easily duplicated and distributed.

The legal climate has not been hospitable to consumers and educational institutions of copyrighted material. Recent revisions to the Copyright Law, the Digital Millennium Copyright Act [DMCA] and the Sonny

Bono Copyright Extension Act, have favored the rights of copyright holders over users. As the Napster case demonstrated, copyright holders and publishers regard digital copying as far greater threat to their profits than other method of duplication (*A&M Records Inc vs. Napster Inc*). They demonstrated a willingness to take copyright disputes to court, and, thus far, have been quite successful. The targets of these cases have been profit-making entities and consumers rather than large nonprofit institutions. There are reasons to believe, and the historical precedent to support that belief, that the courts may treat nonprofits differently, particularly educational institutions. This belief has not been adequately tested. It could ultimately come with definitive legal guidelines, either in the form of new statutes or of judicial decisions.

Historically, the Fair Use doctrine of the Copyright code [17 USC 504(c) (2)] has offered educators some protection, but interpretation of this statute has been both ambiguous and controversial. The Conference on Fair Use (CONFU) held in April 1997, between copyright holders, represented primarily by publishers, and users including educators, represented an attempt by the concerned parties to negotiate terms acceptable to both sides without resorting to litigation. While common ground was established in some areas, there was no consensus on the limits of Fair Use where electronic reserve materials were concerned. Some even suggested that Fair Use did not apply to electronic media at all (Crews, p. 1343).

### ***WHERE THE TEACH ACT HELPS***

The TEACH Act has helped clarify some of these issues. The law was designed to give the instructor of an online course the same basic rights and privileges they would enjoy in the classroom. This means that an instructor can post a variety of materials to a website, whether it is textual, audio, and/or video, provided it is used for educational purposes. The instructor does not need to find and pay royalties to the copyright holders every time they show their student a picture or play music over the Internet, they must abide by the restrictions also written into the law. The restrictions are:

- The course must be taught at an accredited, nonprofit educational institution.
- The institution must have a copyright policy in place.

- The institution must make a reasonable effort make sure that only students registered for that class have access to the material.
- They cannot make unauthorized copies.
- A notice of copyright must be attached to each item.
- For a complete list of restrictions see Harper, p. 1.

The instructor must also be careful about what materials they make available. The amount of material must be "reasonable and limited" and should be no longer than would be used in a regular class session. If the material is unavailable in digital format, then the user is permitted to make a digital copy. If, however, a digital copy already exists, the user must make an effort to obtain access to that copy. Any material that is published specifically for distance education classes, must also be purchased and used according to the terms of the license which usually restricts any user copying and redistribution.

A careful reading of the law leaves those who deal with electronic reserves feeling disappointed. Electronic reserve is not specifically mentioned in the law, but it is mentioned explicitly in the Senate report that accompanies the TEACH Act, which clearly states that lawmakers did not intend to include Electronic Reserves programs, (Senate Report 107-031, p. 10). While this passage does not have the force of law, it is possible that a judge could interpret the intent of the lawmakers that electronic reserve is a practice covered by the TEACH Act. A Power-Point slideshow that contains illustrations scanned from a book would qualify as legitimate under TEACH Act provided it is of sufficient length that it could be viewed in a single class period. Music can be posted, as well as film clips, if they are of a "reasonable and limited" length. Most problematic is the insistence that material be of the type "comparable to that, which is typically displayed in the course of a live classroom session." Most material placed on electronic reserve consists of chapters from books and journal articles, not the sort of material an instructor would ask students to read during class. Those working with electronic reserves should continue to rely on Fair Use to guide and justify their work.

### ***WHAT LIBRARIANS CAN LEARN FROM THE TEACH ACT***

There are reasons to welcome the TEACH Act. Fair Use guidelines remain ambiguous and controversial. The failure of CONFU to establish

a mutual agreement meant there is the danger that copyright holders might seek redress through the judicial process. This would be done to forestall the sympathetic leanings of the legislative branch since they have shown some sympathy for and support for the interests of educational institutions.

Digital information is becoming more commonplace and educational institutions have demonstrated that digital media can be used as a teaching tool in a manner similar to older and more established formats. It is now harder to claim that Fair Use does not apply to digital media. The TEACH Act also gives some guidance to educational users on how to respect and protect the interests of copyright owners. Even though Libraries are not covered by the letter of the TEACH Act, it would be prudent to voluntarily follow the spirit of the restrictions it mandates.

### ***ESTABLISHING EFFECTIVE COPYRIGHT GUIDELINES AND PRACTICES***

Institutions that do not have an up-to-date copyright policy should make development of a policy a priority. The library should play an integral role in developing a policy because it faces copyright issues on a regular basis. It has a valuable and experienced perspective to add to the process. It must make sure that the interests of library users of electronic reserves are represented in the process.

If an institution has an up-to-date policy, staff involved in electronic reserves must be familiar with it, and make sure that they operate within its guidelines. It is also prudent for libraries to make certain that faculty members also understand this copyright policy in an active way:

- Is the material online there only for a specific class?
- Does the posted material seem irrelevant to the subject of the class?
- Does the amount of material seem excessive?
- The instructor must be able to explain why they need an item or the amount of a single item.
- Are items posted items from required textbooks or workbooks?

What copyright holders fear the most is that libraries will cut into their profits.

It is critical to be aware of what is available in digital format. Many books are available in digital format, and can be added to the library's

collection. Thousands of journals and magazines are also available in both paper and online or exclusively online. They are occasionally available free, but most are only available through a publisher's subscription or through a full text database. Terms of licensing are often written to supersede copyright law. It is necessary to make sure that the subscription allows the necessary uses, like electronic reserves, as well as for sufficient access to archived back issues and allows for persistent links. Taking this approach will generally avoid copyright questions in addition to saving the time and effort of scanning textual materials.

A crucial factor is to keep current with changing technology. The TEACH Act requires that users make reasonable efforts to prevent unauthorized individuals from accessing materials and anyone from making unauthorized copies. These are many software programs available that offer various degrees of security. Reasonable means a system that is sufficiently user-friendly for library staff and students to operate as well as being affordable. This could take the form of something as simple as password protecting the course page, and asking students not to redistribute any downloaded material. There is no system that cannot be circumvented by a persistent individual with the right skills.

Copyright is still a thorny issue for those who administer electronic reserve programs, and the TEACH Act does little to change that. Fair Use, with all its vagaries, remains the primary guide for whether or not to copy, or scan, needed material. After years of laws that favor content owners, it is gratifying to educators and librarians to see Congress do something to redress the balance. Weak as it is, the TEACH Act does offer some instruction and guidance as to how far one can go before they step over the line from responsible use of other people's material for educational purposes and exploitation of those people's efforts. If a library is involved in maintaining an electronic reserve system, then educating staff about copyright law is an essential task.

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