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Title: Teaching Higher Education Faculty About the TEACH Act: Using Federal Copyright Law to Design Online Courses

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Teaching Higher Education Faculty About the TEACH Act: Using Federal Copyright Law to Design Online Courses

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Abstract: The TEACH Act of 2002 was passed into American Federal law to give educators guidance for the use of copyrighted material in online courses. It gives broad leeway to a variety of uses and protects educators from copyright holders who do not want their work used without compensation even if the work is clearly allowed under previous provision of copyright exemption under fair use. This session will examine the literature surrounding the topic of teaching copyright in higher education to faculty. It will also look at how this topic (in particular the TEACH Act of 2002) was taught to faculty at Western Illinois University and also cover some of the material that was highlighted in the workshop curriculum.

Key Words: copyright, intellectual property, distance education, higher education, college teaching, course design, TEACH Act of 2002

Introduction

Teaching online has extended the reach of the university. No longer constrained to a physical classroom, higher education faculty can now project their instructional space anywhere in the world. This has not come without learning and technological challenges. One area in particular is the copyright use of instructional materials in online courses. Faculty are often at a loss to determine if the instructional material they use legally in an on-campus course can also be used in the same way if the material is placed online.

In 2002, the United States Congress passed and the President of the United States of America signed into law the TEACH Act. This stood for the Technology, Education and Copyright Harmonization Act of 2002 and it was part of Public Law 107-273. This act clarifies what compliance measures must be implemented with regard to distance education and copyright. It allows teachers and students of accredited, nonprofit educational institutions to transmit performances and displays of copyrighted works as part of a course if certain conditions are met. In cases where these conditions are not met, educators are still able to qualify under another exception, such as fair use or the de minimis rule. This also have the option of getting the permission of the copyright holder as a last resort before replacing these instructional materials with other materials which could be permissibly used for free under the applicable laws.

Literature Review

There is a great deal of literature on copyright and higher education. Much of this literature is applicable to online education. However, much of it deals with applying copyright law to course material or teaching. Not a lot has been written to address how to educate higher education faculty about the topic. This review will cover some of the highlights.

The changing needs of higher education to provide resources (including copyright instruction) for distance education has been known since the late 20th Century. Lorenzen (1998) foreshadowed much of the need for additional resources early for distance education and copyright to be successful. The author wrote, "Perhaps more than any other field, distance education has been remade with the advent of the Internet and the Web. Once entirely in the domain of correspondence courses, distance education is now the trend in education, with institutions at all levels providing instruction to remote and local users through the use of computers and the Web. The Internet has made it possible for teachers to provide their instruction to mass audiences at the same time an institution makes university information and resources available to paying students online." (p. 342).

One of the first reactions to the TEACH Act was Crews (2003). The author noted why it was important. Crews wrote, "Why should educators care enough about copyright to take on this new burden? Quite simply, nearly every text, sound, image, and other intellectual work is protected by copyright. The possibility of infringing someone's copyright occurs whenever educators clip and copy." (p. 34).

Hutchinson (2003) argued that the law did not achieve the clear victory for educational use of copyrighted that many believe it did. The author argued that the act was fraught with requirements and vague terminology and this would cause confusion amongst educational institutions. The author believed many would fail to take advantage of the act. In the end, despite the Act's shortcomings, Hutchinson concluded that the TEACH Act was viable legislation, and offered suggestions to aid educational institutions in making use of the expanded rights to use copyrighted materials in online courses enabled by the TEACH Act.

Dobbins et al (2005) explored the act in regards to nursing informatics. The authors noted the expansion of Web-based courses in nursing education, faculty members were faced with a greater responsibility to be copyright compliant. Their article reviewed the changes in copyright law. The Conference on Fair Use (CONFU), the passage of the Digital Millennium and Copyright Act (DMCA), the passage of the Technology Education and Copyright Harmonization (TEACH) Act, and the recent legal cases were reviewed. The strategies and resources the authors used to secure copyright permission while designing a Web-based continuing education course was also detailed.

Colbert and Griffin (2006) took the view that the Teach ACT may have not achieved its goal. The authors wrote, "Our nation's higher education system is a tremendous resource that must have the freedom to exploit the use of digital technology. Certainly, the interests of copyright owners pale in comparison. If colleges and universities are to make substantial contributions in the future, the TEACH Act and its safeguards require reconsideration." (p. 520).

Reyman (2006) presented an analysis of the TEACH Act and its implications for teaching writing, with an aim toward building awareness among faculty and administrators so that they can become part of the critical conversation about copyright law as it affects teaching and learning with technology. In particular, Reyman focused on teaching writing. The author found the act empowering and noted, "The TEACH Act presents us with some choices. The future may well replicate what we have witnessed in the past decade, where universities continue to fuel the permissions market and pay royalties, thus increasing rewards for packaging discrete knowledge products and restricting educators' rights to use copyrighted materials for teaching and research. But it could look differently-the TEACH Act affords us the opportunity to involve our universities and colleges in the process of educating and informing our campus communities about copyright law as it relates to teaching in a digital age." (p. 43.)

The Congressional Research Service wrote a summary of the act on 2006. In it, Huber et al provided an analysis of the provisions of the TEACH Act, including an explanation of the types of works exempted for distance education purposes, the conditions and limitations placed on the ability to use exempted works, the exemption eligibility requirements for distance educators and students, the limitations on copyright infringement liability of eligible claimants, and the mandatory procedural requirements that transmitting institutions must follow to safeguard copyrighted materials from infringement. The report also examines the potential effect on the rights granted by the TEACH Act that may be posed by the proposed "broadcast flag," a content protection technology designed to limit copying, editing, retention, and other activities regarding the use of digitally broadcast television programs.

Many academic librarians have been concerned and frustrated that the TEACH Act did not do enough to support library use of copyrighted works which often support online courses. Carter (2008) summarized some of this discontent. The author wrote, "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." (p. 49).

Nursing education has also been grappling with copyright issues. Lyons (2010) noted that online education had added to the dilemma. This article discussed the latest information on copyright issues, current guidelines for interpreting fair use and incorporating the TEACH Act, and recent developments in open access publishing as they related to nursing. The author wrote that, "Although this act is not a blanket statement allowing the use of copyrighted materials, it is reassuring that educators can use certain works without breaking the law. The language in the TEACH Act essentially spreads liability for infringements among the educational organization, the instructor, and the participants enrolled in a course." (p. 64).

Understanding copyright and the TEACH Act was compared to the tax code by Uzwyshyn (2011). The author wrote, "Puzzling over the arcana of the Teach Act, more than a few university administrators will be reminded of the minutiae of the tax code. To be sure, copyright law needs to be reconceptualized for the new millennia. Libraries and universities are witnessing a sea change from an earlier era of historical development. Definitions of copyright, technology, and the online classroom need to be recast

or the laws become peripheral in handling new digital copyright questions that increasingly arise. Recent cases, present confusion, and various strong opposing debates regarding streaming media and the Teach Act illustrate these facts well.” (p. 1)

Wilson (2012) looked back after ten years on how educators were being impacted by the TEACH Act. Wilson wrote why this was important. The author noted, “It is important that educators continually learn about legislation that affects the information they are providing in their curriculum but also how they are providing it to their learners...The TEACH Act has evolved into the legislation in 2001 and how educators, politicians, and those effected by technology copyright and Fair Use laws have continued to revisit laws associated with digital learning and new technology. Although there are many articles and publications discussing the TEACH Act, there are no current case laws involving the governing of the Act.” (p. 999.)

Many libraries are embedding librarians into online courses. This often puts them in the frontline of working with the TEACH Act but they do not always have the knowledge. Burik (2013) wrote, “embedded librarians increase their presence in online classes in varied ways, the embedded librarian position evolves into a version of Bell and Shank’s ‘blended librarian’ who serves as both a librarian and educator, and becomes a more valuable member of the academic community. The current lack of discussion about the provisions of the TEACH Act among embedded librarians who write about the work they have done in online courses, however, is a troubling sign. Knowledge of the TEACH Act will help protect embedded librarians and others from copyright infringement and aid in the further development of embedded librarianship.”

Charbonneau and Priehs (2014) studied academic librarians and library staff in the United States about their awareness of various copyright policies, partnerships with campus groups to address copyright issues, and training needs. A majority of the survey respondents reported that they have answered copyright-related questions in the workplace, yet only 49% of the respondents perceived they were prepared to provide copyright information to library users. Awareness of various copyright policies among librarians and staff members varied, including a reported minimal awareness of the TEACH Act. In addition, survey respondents expressed the desire for more copyright-related training.

Librarians are often at the forefront in educating faculty on campus about copyright and the TEACH Act. Conlogue and Christianson (2016) noted this and wrote, “Ultimately, copyright education increases confidence, saves time in planning, reduces anxiety, and protects both the institution and individual. Librarians should proactively advocate for copyright policies and education. Advocating takes time, effort, and relationship building, but it can be done. Librarians can educate patrons and help them work through more complex issues while bringing copyright to the forefront of institutional awareness. Copyright education and guidance provides librarians with an excellent opportunity to raise their visibility on campus and develop a valuable niche within their institution and beyond.” (p. 42).

An attempt was made by Shaver (2017) in a doctoral dissertation to find best practices for using the TEACH Act. Shaver noted that the TEACH Act expanded exemptions but added rigorous institutional requirements and limitations. The requirements were difficult to interpret or implement, limiting access to the benefits, although a few institutions did succeed. The study examined successful institution’s processes, policies, and tools to define best practices with the intent of creating a TEACH Act best practice guide. A lack of specific best practices indicated the need for further research. Shaver proposed that a professional organization conduct further research to develop a series of TEACH Act best practice guides focused on specific types of copyright material to reduce conflicts and gain support of users and owners.

Lazet (2019) applied multiple provisions of federal law including the TEACH Act to teaching about film. The author provided an overview of the United States Code Title 17, Sections 107, 108, and 110 as it related to copyright and films in learning environments. By providing a summary of only the points that are relevant to pedagogy and the viewing of films, the author sought to help readers understand what is acceptable according to Title 17 without readers having to wade through the Code themselves. The paper also included relevant information on the 10% rule and interpretations of Title 17 by such institutions as the American Library Association, and concluded with a brief list of best practices for viewing films in a pedagogical setting.

The Coronavirus pandemic in early 2020 hit higher education hard. Tepp (2020) discussed this in the context of the Internet Archive. Tepp wrote, "Copyright issues have long been the subject of heated debates and it seems even a once-in-a-century public health crisis is not enough to put them aside. To be sure, efforts to mitigate the societal effects of coronavirus-related measures are laudable. At the same time, the over-breadth of IA's efforts combined with its longstanding advocacy for weaker copyright rules have generated skepticism,⁴⁷ particularly among creators and copyright owners whose rights are being 'donated' against their will. This paper will not resolve the policy disputes or calm the heated debate. It is my hope that at least this paper will contribute to the ongoing consideration a more thorough legal analysis and invigorate consideration of the TEACH Act as a way in which at least some needs can be met through a more balanced approach."

Teaching Faculty at Western Illinois University

Like many institutions of higher education, Western Illinois University was hit by the impact of the Coronavirus in early 2020. In mid-semester, on campus courses were moved online and most students left campus. Faculty were caught unprepared. They needed to move all of their courses to an online format with virtually no lead time. Thankfully, they were able to do so.

One major area of concern was copyright. Faculty used many copyrighted resources in campus courses. They knew this was legally allowed. However, there were concerns by many if they could use the same materials online for the same courses. The author of this paper is a librarian and also the copyright resource for campus questions on intellectual property issues. The author fielded many questions pertaining to the questions in this area. Almost without exception, all of the material could be brought to an online format and was already in the public domain, was allowed by the TEACH Act, or was covered by educational fair use.

This made it clear that faculty were going to need ongoing training to be able to understand the vast freedom they had in using copyrighted material for online courses. As such, the author began offering workshops through the Center for Innovative Technology at Western Illinois University for faculty to enroll. Due to the nature of the epidemic, all of the workshops were offered online.

The workshop description noted, "Deciding whether or not to use material for online teaching does not need to be hard. There are ways to stay within what is allowed for copyright in many cases. The TEACH Act passed by Congress in 2002 gives lots of flexibility when the guidelines are followed. In addition, copyright provision for educational fair use and public domain materials are also helpful in putting a course online. This webinar will give an overview to these topics."

The author is not a lawyer. As such, it was noted that the workshops were for educational purposes. The participants were encouraged to refer any legal questions to the university attorney

relating to copyright. However, it was made clear the author would give his best opinion about any use of copyrighted material in an online course.

The workshop sessions covered the history of the TEACH Act and explained what it allowed and what the conditions were. For example, while the TEACH Act makes allowances for the use of some copyrighted materials, instructors must adhere to strict guidelines. However, if the guidelines are followed, most content can be used online for teaching purposes. It is an empowering piece of legislation for online teachers.

A large part of the workshop explained why faculty at Western Illinois University were allowed to use the TEACH Act based on how the law was written. The criteria included that institution must be an accredited, non-profit educational institution, that the use must be part of mediated instructional activities, the use must be limited to a specific number of students enrolled in a specific class, and that the use must either be for 'live' or asynchronous class sessions. Western Illinois University faculty would meet all of these requirements.

The workshop also conveyed that the use must not include the transmission of textbook materials, materials typically purchased or acquired by students, or works developed specifically for online uses. It was noted to faculty that Western Illinois University had developed and publicized its copyright policies. Faculty were reminded to inform students that course content may be covered by copyright, and to include a notice of copyright on the online materials. It was also communicated that Western Illinois University had implemented some technological measures to ensure compliance with these policies, beyond merely assigning a password.

Exceptions to what was not covered by the TEACH Act were covered as well. This included electronic reserves, course packs (electronic or paper) or interlibrary loan (ILL). Although in these cases, the Georgia State University copyright lawsuit resulted in a lot of leeway for universities to use copyrighted material for educational purposes. It was noted that in you can still put material on electronic reserve but it must meet strict copyright use guidelines. The workshop noted that commercial document delivery is excluded as are textbooks or other digital content provided under license from the author, publisher, aggregator, or other entity.

The last exception to the TEACH Act was more difficult to explain but was covered. The conversion of materials from analog to digital formats, except when the converted material is used solely for authorized transmissions and when a digital version of a work is unavailable or protected by technological measures, is not allowed. In other words, do not hack a product to make it available to students. Taking a VHS tape and making an online version may be illegal. It is best not to do that.

The workshop also covered how even with the exemptions from the TEACH Act, most material could still be used online. Fair Use provisions were placed in the copyright law to ensure a balance between the rights of copyright owners and the public interest particularly for educational purposes. Fair Use allows certain people (educators, newspaper opinion writers, critics) the ability to use copyrighted works without permission when the evaluation of the use is considered "fair." This is where things get a bit tricky, however. The lawmakers who created the copyright law and provisions wanted to ensure that the law would remain stable over time. Therefore, they created a set of fair use guidelines rather than a set of clearly spelled out rules. Educators who wish to claim "fair use" should be fully aware of the guidelines and stay alert to changes in the interpretation of the copyright law. Or, in the

case of Western Illinois University, avail themselves of the guidance of librarians and the university attorney.

The workshop covered the four factors of fair use. This included 1. What is the purpose and character? Is the purpose educational? If you are creating a new work based on someone else's original, is it sufficiently transformative to be considered new? 2. What is the nature of the copyrighted work? Is it a published work? Is it fact-based or fiction? Is the work out of print? 3. What is the amount Used? How much of the original work was used? Or if the whole was used, was it necessary for the educational purpose? 4. What is the market effect? No matter the amount, is there likely to be a felt harm for the market or potential value of the original work?

One key point covered in the workshop was that copyright holders do not get to decide the fair use policies of their works. This is set by federal law. A faculty member does not need the permission of the copyright to take advantage of fair use. They do not need to notify the copyright holder if they are using a copyrighted work in a legal fair use manner. The author's past experience from contact with many copyright holders is that feel anything they own must be paid for to use in a course, physical or online. They will try and make the faculty member believe that fair use does not apply even when it clearly does. As such, if a faculty member can make fair use off a copyrighted item, they should just move on and use it and not communicate with the copyright holder. When in doubt if something was covered by the TEACH Act or covered by fair use, the faculty in the workshops were encouraged to seek copyright assistance from campus resources.

Finally, what constituted the public domain was covered. Key points included the public domain is free to use as you like! It was noted that anything published before 1925 in 2020 is in the public domain. That changes every January 1st. It will be before 1926 in 2021 and so forth going forward. It was communicated that US Federal Documents are in the public domain. However, state and most foreign government documents are not. Caution is needed in those cases. Also, anything the author places in the public domain is in the public domain. Look for Creative Commons licenses. Some specify that the work is public domain. Also, copyright is automatic. Do not assume it is public domain just because there is no copyright notice attached.

The reception of faculty at Western Illinois University to the TEACH Act workshops were universally positive. Many expressed their delight that they were able to use everything they had used in a physical course in online education. Further, many discovered that material they had previously never used in a physical course due to copyright concerns was allowed and they could actually use more copyrighted material in on campus courses.

Suggestions from faculty were that the library provide more of these workshops. They also asked that the workshop material be covered in new faculty and new graduate student orientations. Faculty also believed that this workshop should be offered at departmental meetings around campus. In any case, these workshops will continue to be offered in a variety of formats around campus including online formats and the library will continue to take leadership in this educational endeavor.

Conclusions

The Coronavirus pandemic of 2020 caught many universities including Western Illinois University off guard and required a quick change of courses to an online education format. However, many faculty members did not know what was allowed legally in regards to placing copyrighted material online for course purposes. The TEACH Act of 2002 was passed into American Federal law to give educators guidance for the use of copyrighted material in online courses. It gives broad leeway to a variety of uses and protects educators from copyright holders who do not want their work used without compensation even if the work is clearly allowed under previous provision of copyright exemption under fair use. It is important that this information be conveyed to faculty who are teaching online courses so that they can take full advantage of what is allowed under copyright law for teaching purposes.

The workshops for faculty at Western Illinois University on the TEACH Act were highly successful. They were well received by faculty. Many of the participants were delighted to learn about all the uses that they could make of copyrighted material in their courses legally. They recommended more of this kind of education in the future. As the literature review demonstrates, this is not a new topic. However, it is just as important now as it was when the TEACH Act was first passed in 2002. What was done at Western Illinois University on TEACH Act and copyright education for online education can be used as a model at other institutions.

Works Cited

Burik, A. N. (2013). Embedded librarians and the TEACH Act. *School of Information Student Research Journal*, 3(1), 3.

Carter, H. V. (2008). Why the Technology, Education and Copyright Harmonization Act matters to librarians: Two cheers for the TEACH Act. *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve*, 18(1), 49-56.

Charbonneau, D. H., & Priehs, M. (2014). Copyright awareness, partnerships, and training issues in academic libraries. *The Journal of Academic Librarianship*, 40(3-4), 228-233.

Colbert, S. I., & Griffin, O. R. (2006). The TEACH Act: Recognizing its challenges and overcoming its limitations. *JC & UL*, 33, 499-520.

Conlogue, B. C., & Christianson, L. W. (2016). Navigating the Copyright Landscape: Practical Considerations for Librarians. *Pennsylvania Libraries: Research & Practice*, 4(1), 35-47.

Crews, K. D. (2003). Copyright and distance education: Making sense of the TEACH Act. *Change: The Magazine of Higher Learning*, 35(6), 34-39.

Dobbins, W. N., Souder, E., & Smith, R. M. (2005). Living with fair use and TEACH: a quest for compliance. *CIN: Computers, Informatics, Nursing*, 23(3), 120-124.

Huber, J., Yeh, B. T., & Jeweler, R. (2006). *Copyright Exemptions for Distance Education: 17 USC SS 110 (2), the Technology, Education, and Copyright Harmonization Act of 2002*. Congressional Research Service, Library of Congress.

Hutchinson, K. H. (2003). The teach act: Copyright law and online education. *NYUL Review*, 78, 2204.

Lazet, A. (2019). Intellectual Property Rights: Film, Pedagogy, and United States Code Title 17. *Visual Resources Association Bulletin*, 46(1).

Lorenzen, M. (1998). INTERNET RESOURCES: Distance education: Delivering instruction in cyberspace. *College & Research Libraries News*, 59(5), 342-346.

Lyons, M. G. (2010). Open access is almost here: navigating through copyright, fair use, and the TEACH Act. *The Journal of Continuing Education in Nursing*, 41(2), 57-64.

Reyman, J. (2006). Copyright, distance education, and the TEACH Act: Implications for teaching writing. *College Composition and Communication*, 30-45.

Shaver, M. S. (2017). *Technology, education and copyright harmonization act best practices* (Doctoral dissertation, Creighton University).

Tepp, S. (2020). *A Legal Analysis of Making Copyrighted Works Available Online during the Coronavirus Crisis*.

Uzwyshyn, R. (2011). Islands in the Stream: Academic Technology, Digital Copyright, and The TEACH Act. *Higher Education*.

Wilson, L. (2012, March). The TEACH Act-A Catch 22, 23 and 24!. In *Society for Information Technology & Teacher Education International Conference* (pp. 999-1004). Association for the Advancement of Computing in Education (AACE).