

Archivists and the TEACH Act

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In November 2002, Congress passed and the President signed into law the Technology, Education, and Copyright Harmonization (TEACH) Act. Since then many people have asked me if the TEACH Act makes it easier for archivists to exploit copyrighted digital works in support of our services to patrons. Unfortunately, the TEACH Act narrowly defines what behaviors are exempted and who can take advantage of its protections. It is likely, therefore, that the TEACH Act will only protect archivists in a very limited set of circumstances. Government archivists may be the ones best able to use the Act to their advantage.

The TEACH Act updates the copyright law to remove impediments to the use of new technologies in education. The use of a copyrighted work in a class can potentially infringe the copyright owner's exclusive rights to reproduce, display, perform, and transmit the work. The copyright law therefore includes explicit provisions governing the performance and display of copyrighted works in face-to-face education, and there are more limited exemptions for distance education. The TEACH Act recognizes the increasing importance of both digital resources and distance learning in education, and it updates the copyright law to reflect this development.

Summary of changes

First, the Act expands the types of materials that faculty can use in online courses. The law distinguishes between works that can be “performed” (defined as “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible”), and works that are “displayed” (that is, “to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially”). A play or movie is performed; a text document or photograph is displayed.

Under the TEACH Act, the following kinds of material can be used in courses, regardless of whether the courses are taught face-to-face or online:

- Nondramatic literary and musical works that are “performed” may be used in their entirety;
- “Reasonable and limited” amounts of other types of works that are “performed” may be used;



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- For works that are “displayed,” the amount comparable to what is normally displayed in the course of a live classroom session may be used. This could be an entire photograph, letter, or short poem.

In addition, transmission of a distance learning course can now be over digital networks; the old exemptions were designed with closed circuit television in mind. The Act permits the digitization of material for use in a course (if it is not available in digital form). There are no restrictions on the repeated use of copyrighted works without the permission of the copyright owner.

Restrictions

There are, however, numerous restrictions that limit the potential usefulness of the TEACH Act to archives. First, only accredited nonprofit educational institutions and government bodies can use the TEACH Act exemptions; archives in for-profit corporations will still need to seek permission from the copyright owner before using copyrighted works in educational endeavors.

Secondly, the TEACH Act applies only to a systematic, mediated instructional activity – in other words, a course with an instructor. The course does not have to be for credit, but it should be part of the educational program of the institution or government agency. Furthermore, any reproduction, performance, or display of copyrighted material must be done at the direction of the instructor. In short, we cannot simply claim that an online exhibition is “educational” and hence covered by the TEACH Act – the material must be provided at the direction or under the supervision of an instructor.

The limitations on the amount that may be digitized or used should not be forgotten. The Act adds that the performance or display must be an integral part of a class session. What does this mean in practice? It would seem that one might be able to read out loud an entire essay (a performance of a non-dramatic work) if it was an integral part of a class session (and not just background or supplemental reading). A limited portion of a commercial movie could be shown, again if it was an integral part of a class session. The report accompanying the legislation expressly excludes from protection the creation of repositories of ancillary materials: “The amended exemption is not intended to address other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form, such as electronic course packs, e-reserves, and digital library resources.”

In order to take advantage of the protections offered by the TEACH Act, there are other requirements that must be met. Among them are: one cannot digitize if there is already a digital copy available from the copyright owner; the copy used must be lawfully made and acquired; access to the materials must be limited to students enrolled in the course; all digital copies must be protected by technological protection measures to discourage students from making copies of the works for their own use. Notice must also be given to the students that the material may be subject to copyright protection. An institution wishing to avail itself of the TEACH Act exemptions must also have policies

in place regarding copyright, and must provide information to faculty, staff, and students that accurately describes and promotes compliance with copyright law.

Implication for archives

What does all this mean for archives? The TEACH Act explicitly exempts from copyright infringement an instructor's use of small amounts of materials from the archives in his or her teaching. It also permits non-profit educational institutions and governments to digitize analog material for use in a course (assuming that all of the requirements of the TEACH Act are met). Only the amount permitted by the law may be digitized; the digital copies may not be shared with any other institution; no further copies from them can be made; and they may only be used in the course.

In theory, by shielding archives from liability, the Act may make it easier for archives to make copies of entire nondramatic audiovisual works or textual documents. Prior to the TEACH Act, however, most archives would still have done such copying under the Fair Use provisions of the Copyright Act (and nothing in the TEACH Act alters or limits the Fair Use doctrine). The TEACH Act may slightly reduce archival liability, but I do not see it radically changing archival practice.

Perhaps the greatest impact of the TEACH Act will be on the education programs that many government archives conduct for governmental employees. NARA and the state archives often conduct courses for federal and state officials on records management, records appraisal, and other archival topics. The TEACH Act exempts copyright violations when the transmission is "a regular part of the systematic mediated instructional activities of a governmental body" directed at "officers or employees of governmental bodies as part of their official duties or employment." The instructors in such courses will no longer need to get permission when using or re-using portions of movies, videos, cartoons, essays and other copyrighted materials in the course – assuming the requirements of the TEACH Act are met.

Additional Resources

The TEACH Act is complex, and its implications still need to be developed. Three excellent sources for more information on the TEACH Act are the "TEACH Toolkit" at North Carolina State University <http://www.lib.ncsu.edu/scc/legislative/teachkit/>, Georgia Harper's TEACH Act checklist <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>, and the resources available from the American Library Association at <http://www.ala.org/>. Any archival institution wishing to use the exemptions found in the TEACH Act would do well to check with their own legal counsel as well.