

Copyright in Increasingly Digital Academic Contexts: What it Takes

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ABSTRACT

The first words in the title of the first United States copyright law are: “An Act for the Encouragement of Learning.” In the dozen years since the Mosaic browser put a public face on the Internet, we have witnessed an unprecedented flurry of revisions to U.S. copyright law, but few of these revisions speak directly to this foundational goal of encouraging learning. One revision that purported to do so, the TEACH Act (or Technology, Education and Copyright Harmonization Act of 2002) offers an object lesson in what academics stand to lose if they fail to intervene in the legislative process. The TEACH Act announces itself as an “Educational Use Copyright Exemption” when in practice, the Act circumscribes rights that most academics have long taken for granted, including, for example, the right to screen motion pictures in the classroom. My presentation will focus on identifying what, specifically, has been taken from academics, and from the general public, in the recent revisions to copyright law. I will close by articulating ways for academics to offer practical and meaningful leadership in reversing the depressing arc of 21st Century copyright law.

1. INTRODUCTION: A wakening

In 1993, my inability to legally access an electronic copy of *Finnegans Wake* housed on a Canadian Web server sent me spiraling out of literary studies and into rhetoric, the discipline that offered me the tools and the vocabulary I needed to intervene in the then-impending and now-explosive debate over computers and copyright. As a master’s student completing a thesis

addressing Joseph Campbell’s specious charge that Thornton Wilder’s *The Skin of Our Teeth* was a plagiarism of the *Wake*, I was using the then-novel Mosaic browser in hopes of securing a powerful research tool — a searchable electronic text of Joyce’s famously complex work — to help me complete my project. To my surprise I learned that U.S. copyright was markedly more restrictive than Canadian copyright. And I was forced to confront the grim truth that Canadian scholars could freely access the e-text version of the *Wake*, while I could not (at least not legally).

I have spent the intervening years increasingly focused on using rhetoric to interrogate and expose the often-startling shifts in intellectual property policies, which have tilted decisively away from scholarly and public access and toward permissions and restrictions imposed by copyright holders. A recent book project offered me an opportunity to pursue this research at length, and I either discovered or belatedly reminded myself of what I now believe to be the single most important fact about U.S. copyright for contemporary academics. The United States’ first copyright law, passed in 1790 by the first U.S. Congress, is titled, “An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.” [1]

In U.S. copyright the importance of scholarly access to information is *explicit*. Indeed, this is the foundational impulse at the heart of U.S. copyright law. And we, as educators, have failed in our obligation to embed this simple fact in the public’s consciousness. The result of this failure has been a precipitous decline in what once were presumed to be the “rights” of access guaranteed by a purportedly balanced approach to copyright.

Use and Abuse

One indication of the degree to which U.S. Copyright shifted away from its foundational focus on encouraging learning is the 1976 revision to copyright, which at the time seemed to perform a much needed service to academics, researchers, and journalists by codifying the fair use “exception” to copyright law. But when fair use is understood within the broader historical context of a copyright law ostensibly directed at encouraging learning, it becomes clear that this exception was an index of how much territory had already been ceded to copyright holders. The protections of fair use — directed at limited uses of copyrighted materials by scholars, researchers, and critics — made exceptions from what ought to have been understood as the rule, i.e. that copyright is directed at promoting the activities of educators, scholars, and critics and, further, that copyright conflicts should

always be interpreted with particular deference toward those uses that participate in the learning process, broadly conceived.

A second example of copyright's journey away from its foundational focus on encouraging education is the Technology, Education And Copyright Harmonization Act of 2002. The TEACH Act's own statement of purpose positions the Act as grounded in the realities of 21st Century educational spaces:

The Act allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet, while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in a digital format.[2]

This sentence is striking in the initial promise of "allowing students and teachers to benefit . . . from technologies like the Internet" is immediately counterweighted with the notion of "safeguards" to ward off "risks to copyright holders." For the drafters of the the TEACH Act (the initial bill was introduced by Senators Orrin Hatch and Patrick Leahy) this is understood as "balance" and this dynamic is scrupulously maintained throughout the TEACH Act's purpose statement. The purpose statement's first paragraph concludes by asserting: "This legislation has been crafted in a process that has ensured a broad consensus of affected parties." [3]

Would that it were so.

A later passage in the TEACH Act's purpose statement cements the Act's pattern of ostensibly "giving" with one hand, only to promptly take away with the other:

The Act expands the exempted copyright rights, the types of transmissions, and the categories of works that the exemption covers beyond those that are covered by the existing exemption for performances and displays of certain copyrighted works in the course of instructional transmissions. Thus, for example, it allows transmissions to locations other than a physical classroom, and allows for performances of reasonable and limited portions of audiovisual works, sound recordings, and other works within the scope of the exemption. At the same time, it maintains and clarifies the concept of "mediated instructional activities" to which the exemption applies, and includes safeguards such as obligations to implement technological protection measures and limitations on the amounts of certain types of works that may be performed or displayed.[4]

The purported "expansion" of the first sentence represents, in functional terms, a narrowing of opportunities for classroom instructors who, prior to the Act might reasonably have projected their default interpretation of fair use into their distance classrooms. The TEACH Act is based in the presumption that traditional fair use exceptions *never* fully applied to distance classrooms, and that by now specifying a limited pool of rights for distance classrooms, the Act is adding to, rather than subtracting from the pool of resources available to instructors. Thus, the TEACH Act's reiteration and specification of these limitations recalibrates copyright to the detriment of classroom instruction.

But wait, it gets worse.

The "safeguards" and "limitations" pointed up at the above-referenced excerpt's conclusion are in fact, so burdensome that they give the lie to any notion that the TEACH Act reflects the efforts of a "broad consensus of affected parties" — at least if we acknowledge that classroom teachers and their students number among the affected parties.

The practical consequence of the TEACH Act is the creation of a two-tiered system in which traditional fair use presumably applies in non-networked classrooms, while a different, and staggeringly complex set of rules governs classrooms that engage in any significant form of distance delivery. To bring the TEACH Act's incursions into what had been historically understood as reasonable and fair use of media within a classroom environment into focus, one need only contrast the process for screening a full length film in two parallel sections of the same undergraduate class — one held in a traditional, non-networked classroom, and the other held in a classroom offering distance delivery of some content via the Internet. In the non-networked classrooms of non-profit educational institutions, the instructor simply secures a legal copy of the film and a suitable player, and *shows the film*. The instructor has no special obligation to secure permission or to compensate the creators. This is non-profit educational use, and it is exempted from liability by current copyright law. (WARNING: Your institution's librarians or lawyers may opt to err on the side of caution, but the law on this is absolutely clear — or at least it was up until the TEACH Act. Screening of films for educational purposes was specifically addressed in and allowed by the 1976 revision of the U.S. Code's copyright statutes.) In a traditional classroom the process has often been as simple as "choose it and use it." But The TEACH Act mandates a process for instructors in classrooms with distance delivery that involves at least 15 steps. The instructor is charged with (among other responsibilities) stipulating that the learning institution in question has "provided informational materials" that "accurately describe and promote compliance with the laws of the United States regarding copyright." [5] What had been a relatively simple decision in a traditional classroom environment has been supplanted by a process that by design or by default will drive most reasonable instructors to forego most uses of commercially copyrighted material in classes involving distance delivery of any significance.

The arc of post-Internet copyright legislation is obvious. Each successive piece of copyright legislation over the past decade has consolidated the power of copyright holders at the expense of public and scholarly access. The question at hand is what, if anything, academics will do to change this arc.

What it Takes 1.0

I am challenging my colleagues to help achieve this change by making copyright a point of focus within their pedagogy. 21st Century academic practice necessarily implies awareness of and engagement with copyright questions. While this is true across disciplines, it is especially true of those disciplines addressing communication, and composition, and especially *especially* true for those scholars with a particular commitment to communication and composition in digital contexts. We are the canaries in the copyright coalmine. We sense the consequences of shifts in copyright policy well before the general public becomes aware of them.

If we are serious about teaching with networked computers as the default composing space, then we clearly have an obligation to teach copyright. The potential of digital media is overwhelming expansive, and tremendously exciting. The chief limiting factor on this potential is copyright. But these limits are often invisible to our students.

I am suggesting here that classroom instructors too often “paper over” their difficulties with adhering to contemporary copyright laws. Students are often unaware that a particular work was not included in their syllabi because the fees or permissions associated with its use were too burdensome. Instructors also have a tradition of selective non-compliance with copyright laws, quietly making works available to students even when the use of those works arguably falls outside the letter of current law. This latter strategy makes a kind of sense. It is difficult to imagine a publisher or studio pursuing a pure-hearted (and shallow-pocketed) classroom instructor for making work available to students, and it is likely that most courts would reject such pursuit as directed at correcting a *de minimis* (or trivial) violation of the law.

But from time to time I envision a different approach, in which the academy, writ large, committed to a year or two of living within the absolute letter of the law. Our slideshows would be largely illustration-free. Our syllabi would devolve to those works assuredly in the public domain (most of which predate 1922) but we would leave struck-through references to the works we might have chosen were it not for increasingly Byzantine fee and permission processes.

The idea here would be to stage a collective “strike” against the strictures of contemporary copyright, and to make the degree to which the law is at odds with standard academic and cultural practices more visible and more tangible for our students.

In my experience, nothing turns a classroom of students into sputtering Mr. Bumbles (the character from Dickens’ *Oliver Twist* who famously and agrammatically grumbled, “If the law supposes that . . . the law is a ass, a idiot”) more efficiently than a detailed explanation of the current duration of copyright, or the limitations embedded in the Digital Millennium Copyright Act, or, for that manner, any copyright law passed in the last decade. Having this frustration become a point of focus in our classrooms is an important step toward eventually recalibrating copyright for the Internet era.

What it Takes 2.0

Not only must we teach. We must also act. There are a handful of organizations working to encourage intellectual property laws that address the practical realities of the Internet and digital media. Most notable among these are [Creative Commons](#), the [Electronic Frontier Foundation](#), the [Digital Future Coalition](#), and the [Intellectual Property Caucus of the Conference on College Composition and Communication](#) (this last being especially calibrated to the needs of teachers of writing, composition, and communication). But over and above these organizations, I think there is an often-underestimated value in the simple act of writing letters to legislators. All who teach have access to institutional letterhead, and those among us who teach at public, land-grant, or state institutions have a particular claim on our representative’s time and attention. We are fellow public servants, with a shared obligation to the citizens of our various states. And those of us who teach writing, rhetoric, and composition are, by definition, experts at crafting arguments.

Perhaps naïvely, I believe that the laws of tomorrow might bend just a little closer to a true “broad consensus of affected parties” if each piece of copyright legislation triggered a barrage of comments from classroom instructors delivered on university and college letterhead. This is not to suggest that nothing like this has attempted or occurred in the past. It is to suggest, sadly, that what has been done to date is not nearly enough.

The practices of teaching writing, composition, and communication are increasingly being compromised by contemporary copyright laws. Given U.S. copyright’s foundational impulses, this is an absurd circumstance. As an especially ripe example of recent laws curtailing public and scholarly access to the use and circulation of information, the TEACH Act clearly reminds us of the two things we must do, and do better, if we are ever to recover “an Act for the encouragement of learning.”

2. REFERENCES

[1] <http://www.copyright.gov/history/1790act.pdf>

[2] <http://www.lib.ncsu.edu/scc/legislative/teachkit/teach.pdf>