

Whither the *TEACH Act*?

by Susan Lewis-Somers

The following fictional scenario is not new to most law librarians:

Law school Professor Carol Morgan teaches a class in labor law. To illustrate the rights that employees possess under federal labor law to organize into unions, she always shows her class excerpts from "Norma Rae," a dramatic film starring Sally Field. The film tells the story of a textile worker's successful struggle to organize her fellow workers to vote for union representation in the face of an oppressive employer.

Morgan believes that "Norma Rae" perfectly illustrates how the right to unionize is exercised under the federal labor laws her class is studying. It brings to life what otherwise might be a dry federal statute.

She is able to show parts of the film, which is otherwise protected from unauthorized displays by federal copyright law, without seeking the permission of its owner. The copyright law offers a "fair-use" exemption to teachers, which allows them to show the "performance or display of a work... in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom."

Next semester, Morgan will teach the same labor law class as part of her law school's new distance education program. Of course she would like to show excerpts from "Norma Rae" to her distance students in remote locations via Internet transmission. However, she is chagrined to discover that there is no similar copyright exemption that would allow her to offer the same display to students who are not participating in "face-to-face teaching activities."

Fair Use for Distance Education

Educational and library organizations worked with members of the 107th Congress in 2001 to amend current copyright law in order to assist Morgan and other distance educators. They argued that current law inhibits the development of distance education programs by prohibiting teachers from using the same copyrighted works in their online courses that they have been displaying in "face-to-face" courses. In addition, the Copyright Office issued a report to Congress in 1999 that recommended legislation to include distance educators in the existing fair-use exemptions available to most educators.

Two of the most influential senators agreed with these appeals. On March 7, 2001, then-Senate Judiciary Committee Chairman Orrin Hatch, R-Utah, and then-Ranking Minority Member Patrick Leahy, D-Vt., introduced legislation that would extend the fair-use exemption already available for face-to-face educators to distance educators, as well. (The positions of Sens. Hatch and Leahy were reversed when the Republicans lost control of the Senate to the Democrats in June 2001.)

A Delicate Compromise

The Senate Judiciary Committee unanimously approved an amended version of the bill, the *Technology, Education, and Copyright Harmonization Act of 2001*, known as the *TEACH Act*, on May 17, 2001, and issued a report recommending passage by the full Senate.

The committee approval came only after Sens. Hatch and Leahy had sponsored intensive closed-door negotiations between education and library representatives and representatives of the publishing and entertainment industries. The media were concerned about opening the door to the potential piracy of distance education transmissions. Their representatives had opposed the bill as introduced and had complained bitterly at a Judiciary Committee hearing on March 13 that the original bill would not adequately protect media from the technological abuse they argued would arise from these distance transmissions. Both sides came away from the negotiations apparently satisfied with the delicate compromise embodied in the amended legislation.

The *TEACH Act* amends the federal copyright law to also exempt from copyright protection "the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work ... by or in the course of a

transmission," but only (1) if the display were "at the direction of" a teacher as "an integral part of a class" offered by an "accredited nonprofit educational institution," (2) if the display were "directly related" to and "material[ly] assist[ed]" the course, and (3) if the transmission were "made solely for" and limited to "students officially enrolled" in the class. (The legislation would also create an exemption for distance courses offered by government entities.)

Furthermore, to assuage the fears of publishers and the entertainment industry, schools taking advantage of the distance exemption would be required to "institute policies regarding copyright, provide informational materials to faculty [and] students ... that ... describe, and promote compliance with" federal copyright laws, and "provide notice to students that materials used ... may be subject to copyright protection." In addition, they would be required to "apply technological measures" to prevent students and others from retaining the transmitted work for longer than the class session and from disseminating the work to others.

Finally, to protect the instructional materials market, the *TEACH Act* would further amend the federal copyright law to exclude from the new distance exemption "work[s] produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks."

Sailing Toward Passage

The full Senate promptly approved the *TEACH Act* on June 7, 2001, and it was sent to the House of Representatives, where it was referred to the Judiciary Committee. Its Subcommittee on Courts, the Internet, and Intellectual Property wasted no time. It held a hearing on June 27 and approved the bill on July 11, clearing the way for full Judiciary Committee action.

(A similar bill, H.R. 2100, appears to have stalled. In addition to provisions nearly identical to those in the *TEACH Act*, it would also extend the distance exemption to nonprofit libraries that offer distance courses, an extension that some fear would endanger the delicate compromise embodied in the act.)

Then came Sept. 11.

The End of Routine Business

After the terrorist acts of that day, Congress put aside its regular business to concentrate on urgent anti-terrorism measures, emergency assistance to victims and businesses affected by the disaster,

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and economic stimulus legislation. The House Judiciary Committee, which had been poised to take up the *TEACH Act* bill after the subcommittee approval in July, spent most of the fall season considering various pieces of anti-terrorism legislation that would affect the federal justice system. The *TEACH Act* and other more routine legislation fell by the wayside.

It now appears that, as of this writing in early December, the *TEACH Act* will not be considered again until at least the second session of the 107th Congress in 2002. Mary Alice Baish, AALL's associate Washington Affairs representative, said

that the legislation could be left to languish in 2002 without renewed pressure from education and library groups. The groups must continue urging chair of the House Judiciary Committee, James Sensenbrenner, R-Wis., and other committee members to schedule the bill for the full committee's consideration, Baish said. In spite of its wide popularity with members of Congress, many of whom serve small town and rural constituencies that would benefit from distance education programs, the bill may fall victim to the politics of other legislation that carries a higher priority for Rep. Sensenbrenner.

A Call for Renewed Grassroots Pressure

Baish recommends that law librarians contact their representatives in the House, particularly if they sit on the Judiciary Committee, and urge them to support prompt committee consideration of the bill. "The *TEACH Act* can be resurrected" Baish said, "with the grassroots support of librarians and educators, who have a stake in the principle of fair access to information for all educators and their students."

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