

# **COPYRIGHT REFORM: SCHOOLS**



# SCHOOLS OF THE FUTURE

# DIGITIZATION OF THE “CLASSROOM”

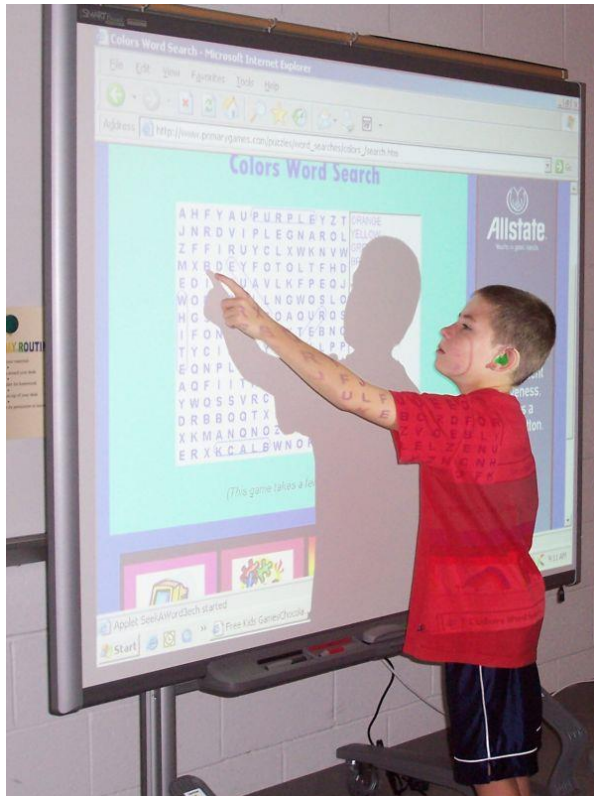


PHOTO COURTESY OF SCHOOL OF ONE

# NEW MODELS: COPYRIGHT X

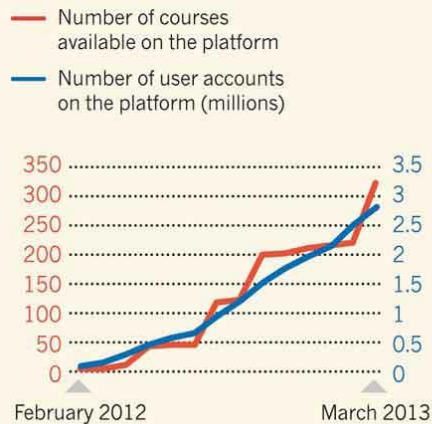


# MASSIVE OPEN ONLINE COURSES– THE MOOC

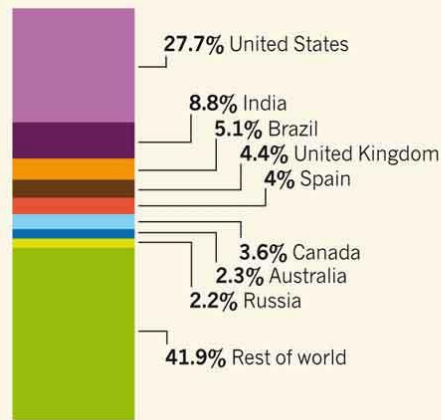
## MOOCs rising

Over little more than a year, Coursera in Mountain View, California – the largest of three companies developing and hosting massive open online courses (MOOCs) – has introduced 328 different courses from 62 universities in 17 countries (left). The platform's 2.9 million registered users come from more than 220 countries (centre). And courses span subjects as diverse as pre-calculus, equine nutrition and introductory jazz improvisation (right).

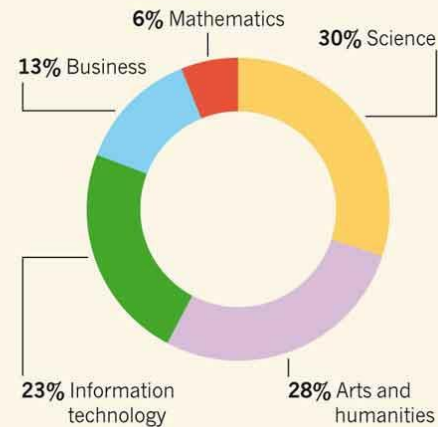
### Supply and demand



### Student origins



### Courses offered



# MOTIVES FOR SCHOOL REFORM

- Increased access/dissemination of protected content
- Piecemeal reform and judicial intervention has left the Copyright Act in shambles with courts attempting to step in where Congress left off
- Orphan works present unique, modern problems
- Dramatic increase in digital content
- Confusion over rights and protections in Copyright Act has led to increased self-policing of content risking user rights

See Maria Pallente, *The Next Great Copyright Act*, 36 Col. J.L. & Arts 315, 319-324 (2013).

# THREE TIERED APPROACH


- 1. Regulating the Institutions**
- 2. Regulating the Student/Teacher Interaction**
- 3. Regulating Use of Content**

# REGULATING INSTITUTIONS

## Rights Clearance Processes

- Determining necessity for a license
- Locating the copyright owner
- Licensing intermediaries
- Negotiating a license

## Relevant Issues for Educational Institutions

- Big and cautious institutions over license
  - Underfunded institutions cannot compete
  - Content owners of non-educational material have little incentive to negotiate with educational institutions
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# REGULATING STUDENT/TEACHER INTERACTION

Classroom Use Exception


TEACH Act



# THE CLASSROOM USE EXCEPTION

- **17 U.S.C. § 110(1)**
- **Generally permits academic institutions to PERFORM or DISPLAY protected works in CLASSROOMS where FACE-TO-FACE teaching occurs**
- **Provision added to the Copyright Act in 1976**
- **Congressional report (H. Rep. 94-1476)**
  - Report cites “no need for a statutory definition of “face-to-face” teaching. . .”
    - Statute “does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place.”
  - “[T]he performance or display must be “by instructors or pupils,” thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program.”
  - “[P]erformances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The “similar place” referred to in clause (1) is a place which is “devoted to instruction” in the same way a classroom is. . .”
- **Explicitly not intended to cover broadcast**

# THE CLASSROOM ACT- ISSUES

- **Narrow conception of WHO is protected**
    - School are multi-dimensional
    - What about specialized schools? E.g. music, arts?
      - E.g. Actors, singers, instrumentalists
  - **Narrow conception of WHAT is protected**
    - Modern classroom extends beyond the Act's notion of time
      - What if students are assigned a group project to be prepared out of normal class time?
      - Homework?
    - Modern classroom extends beyond the boundaries of the four-walled classroom
      - E.g. Web pages
      - E.g. Blogs
      - What about streaming technology? Can a Netflix model be imported into the classroom?
  - **What about OTHER rights?**
    - E.g. reproduction
      - Where Fair Use kicks in is unclear, paralyzing educators in legal uncertainties
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# SPECIAL CASE: FILM TEACHERS

- Educators are only protected from showing copies “lawfully made under this title”
- Showing screen clips is essential to teach the art of historical and modern cinema
- However. . .vast majority of film are locked-up by DRM technology (CSS)
- What’s the alternative?
  - Abandon film education,
  - Engage with an extremely costly/time consuming licensing regime
  - Use illegal circumvention technology & infringe
- See e.g. McGeeveran & Fischer’s “DVDs in Film Studies Classes: DRM and the DMCA Interfere with Educational Use of Film Content”
  - “Our research indicates that many film studies professors ‘probably most of them’ respond to these difficulties by circumventing CSS, region coding, and navigation controls, despite the likely illegality of doing so. Those who abide by the law face enormous practical difficulties in their everyday teaching.

# TEACH ACT

- 17 U.S.C. § 110(2)
- Exempts liability for the “performance of a non-dramatic literary or musical work or reasonable and limited portions of any other work, or a display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission” from copies lawfully made under the Act
- DMCA passes in 1998 without resolution of the distance education issue
- Copyright Office ordered to consult with non-profit education institutions, content owners, libraries, archives etc. on a distance education reform bill
  - The goal was to “promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users.”

*Technology, Education, and Copyright Harmonization Act of 2001: Hearing on S. 487 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. of the Judiciary, 107th Cong. 7 (2001) (statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States, Library of Congress), available at <http://judiciary.house.gov/media/pdfs/printers/107th/73473.pdf>.*

# THE TEACH ACT

- After much lobbying, bill passed in 2001
- Concerns expressed in TEACH Act debates centered on:
  - What types of “technological measures” the Act required
  - The extent to which educational institutions were obligated to prevent students from downloading content
  - What constituted a “reasonable” effort to prevent unauthorized access to content under the Act
  - The costs associated with implementing content protection measures
  - The litigation potential over an educational institution’s “reasonable” of technological protection of content
  - Choice of law problems for disputes related to the transmission of digital technology abroad
  - See *Promoting Technology and Education: Turbo-Charging the School Buses on Information Highway: Hearing Before the S. Comm. on the Judiciary*, 107<sup>th</sup> Cong. 45-63 (2001).

# THE TEACH ACT

- The result was a statute with an overly narrow conception of WHO is protected
  - Non-accredited institutions
  - For-profit institutions?
- Narrow conception of WHAT is protected
  - Supplemental materials?
  - E-reserves?
  - Streamed content?
  - Homework/non-class time use
  - What does 'reasonable and limited portion' mean?
- Technological access restrictions impede digital learning
  - Cost prohibitive
  - Requires technological 'know-how'

# EDUCATIONAL USE UNCERTAINTY: EXAMPLE

- The Association for Information Media Equipment (AIME) and Ambrose video sue UCLA for infringement in 2010
- UCLA streamed educational videos, documentaries, and theatrical films to students - the content was accessible only through a password protected, secure webpage by students enrolled in that course
  - Instructional media racks up a \$45,000/year bill for UCLA
  - The University began converting requested titles into streamable material in 2005
    - See Jill Laster, *UCLA Will Resume Streaming Video After Legal Dispute*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 3, 2013) <http://chronicle.com/blogs/wiredcampus/ucla-will-resume-streaming-video-after-legal-dispute/21594>.
- Case dismissed “without prejudice” for lack of standing
- Was UCLA protected from liability?
  - Classroom Act?
  - TEACH Act?
  - Fair Use?



# FAIR USE

- 17 U.S.C. § 107
- Educational users are NOT necessarily fair uses
- The Court in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 562 (1985) stated that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”
  - How does this apply to students/educators? Maybe the even first fair use factor does not shield students/teachers?
- Fair use guidelines are too rigid/narrow
- Ambiguity as to whether specific types of works qualify for protection
  - E.g. course reserves, course packs, orphan works
  - See *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2010)

# CAUTIOUS STAKEHOLDERS

- Universities
- Publishers
- Insurance companies



# REGULATING USE OF CONTENT

- Digital Rights Management (DRM) systems are technological protections supplying content owners with total control over digital work
- DRM systems provide protection against piracy and price control incentives

## IMPLICATIONS FOR EDUCATION?

- Educators' use does not typically constitute the type of use that undermines markets reserved to the copyright owner
- Educators cannot afford to pay for access to the material and content owners have little incentive to negotiate with educators for a lowered price
- No DMCA circumvention exception for educational institutions
- Due to licensing and self interests, educational institutions limit access to their own information thereby limiting public sharing

# SOLUTIONS?

- Safe Harbor for legitimate uses by legitimate educational institutions?
- General license for all uses by educational institutions?
- DMCA circumvention exception for educational institutions?
- Incentives for content users to negotiate with educational institutions?



# ADDITIONAL PROPOSALS

- Fix legal issues with the Classroom Act, the Teach Act via targeted legislation
- Adjust the Fair Use standard to ensure educational uses are restored to a position of "privileged" uses
- Institute a compulsory licensing scheme for educational institutions for rights clearance purposes (technology can play an important role)
- Develop "standards and best practices" for educators' use of content, including Fair Use principles
- Encourage use of content under open licensing models like Creative Commons

William McGeeveran & William W. Fisher, III, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* (Berkman Center Research Publication No. 2006-09).