

Understanding Copyright Compliance for Distance Education

Congress enacted the TEACH Act in 2002 to address issues surrounding lawful uses of copyrighted works in distance education. The act revises Section 110(2) of the U.S. Copyright Act, and allows educators to use certain copyrighted works in distance education without permission from, or payment of royalties to, the copyright owner. The TEACH Act improves upon previous law by allowing uses of an expanded range of works in distance education. However, the TEACH Act does not address every use of copyrighted materials for distance education, and still leaves some language vague and up to interpretation.

Fair Use

Nothing in the TEACH Act is intended to limit or otherwise to alter the scope of the fair use doctrine. Fair use is still an applicable use of copyrighted materials in distance education. Not only instructional performances and displays, but also other educational uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could also apply to instructional transmissions not covered by the changes in the TEACH Act, e.g., the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances. Two principles apply:

1. the fair use doctrine is technologically neutral and applies to activities in the digital environment; and
2. the lack of established guidelines for any particular type of use does not mean fair use is inapplicable. (U.S. Senate Report 107-31, 107th Congress, 1st Session, p. 15)

IPFW Policy

IPFW does not have a blanket policy that applies to every educational use of copyrighted materials. Each use of copyrighted material must be judged on an individual basis to determine whether the use is permissible under U.S. copyright law. If there is doubt that a use is permissible then copyright permission should be requested from the copyright owner.

IPFW requires the use of the TEACH Act Checklist

(<http://www.copyright.iupui.edu/teachlist.htm>) when using copyrighted works for educational purposes. The primary purpose of the checklist is to help document your compliance with the TEACH Act. The checklist enumerates the law's requirements and groups them according to the unit within the educational institution that will likely be responsible for each step. Educators must complete and keep a copy of this document for each use of copyrighted materials in a distance-education course. Maintaining such records may be critical for demonstrating your compliance. If the TEACH Act Checklist does not address your situation, consult the Fair Use Checklist at <http://www.copyright.iupui.edu/checklist.htm>)

TEACH ACT Section-By-Section Analysis*

TEACH Act requirements that fall within the duty of the Instructor:

1. The work to be transmitted may be any of the following:

- A performance of a non-dramatic literary work; or
- A performance of a non-dramatic musical work; or
- A performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; or

What constitutes a "reasonable and limited" portion should take into account both the nature of the market value for that type of work and the pedagogical purposes of the performance." (p. 7) The "reasonable and limited portions" refers specifically to the performance right exemption.(p. 8)

- A display in an amount comparable to that which is typically displayed in the course of a live classroom session.

The "display" exemption is specifically targeted at digital display of text, e.g. textbook materials, poems, short stories, images of pictorial, graphic or sculptural works. It is meant to limit the display of digital images as a substitute for the traditional purchases of the work (especially textbooks). (p. 8)

2. The work to be transmitted may not be any of the following:

- Marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity; or

This exclusion is for works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks." (pg. 8) This exclusion is NOT intended to apply generally to all educational materials or to all materials having educational value. The exclusion is limited to materials whose primary market is "mediated instructional activities." So for example a digital display of material from a textbook that would typically be purchased by students in the local classroom environment, in lieu of purchase by the students is NOT permitted. However, an instructor may use a chart or table or other excerpt from a textbook different from the one assigned for the course, or from the assigned textbook that had been purchased by the students. (p. 10). In addition, the reference to "digital networks" is intended to omit the exclusion to materials whose primary market is the digital network environment, NOT instructional materials developed and marketed for use in the physical classroom. (p. 8)

- A textbook, coursepack, or other material in any media which is typically purchased or acquired by students for their independent use and retention.

This exemption does not permit 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 e-reserves, course packs, and library resources. (p. 10)

3. Any permitted performance or display must be both:

- Made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities of the educational institution; and

“actual” supervision is intended to require that the instructor is, in fact, supervising the class activities, and that supervision is not in name or theory only. This qualification is intended to make clear that the transmission must be part of mediated instructional activity. This provision is not intended to require either constant, real-time supervision by the instructor or pre-approval by the instructor for the performance or display. This provision is not intended to limit the asynchronous learning, at the pace of the student. (p. 9)

“integral part” of a class session means that it must be part of a class itself, rather than ancillary to it. This exemption does not permit 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 e-reserves, course packs, and library resources.

- Directly related and of material assistance to the teaching content of the transmission.

The portion performed or displayed may not be performed or displayed for the mere entertainment of the students, or as unrelated background material. (p. 11)

4. The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired.

An educator would typically purchase, license, rent, make a fair use copy, or otherwise lawfully acquire the copy to be used. Works not yet made available in the market (whether by distribution, performance or display) are ineligible for use under this exemption. (pp. 8-9)

5. If the work to be used has to be converted from print or another analog version to digital format, then both:

- The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
- There is no digital version of the work available to the institution or the digital version available to the institution has technological protection that

The committee recognizes that some works may not be available for us in distance education, either because no digital version of the work is available to the institution, or because available digital versions are subject to technological protection measures that prevent their use for the performances and displays authorized by TEACH. In those circumstances where no digital version is available to the institution or the digital version that is available is subject to technological measures that prevent its use for distance education exemption TEACH authorizes the conversion from the analog version, but only conversion of the portion or amount of such works that are authorized to be performed or displayed as described above. (p. 14)

TEACH ACT requirements that will likely fall within the duty of the Institution:

6. The institution for which the work is transmitted is an accredited nonprofit educational institution.
7. The institution has instituted policies regarding copyright.

The institution is required to institute policies regarding copyright and to provide information to faculty, students and relevant staff members that accurately describe and promote compliance with copyright law. Further, the institution must provide notice to recipients that materials used in connection with the course may be subject to copyright protection. (p. 11)

8. The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws.
9. The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.
10. The transmission of the content is made solely for students officially enrolled in the course for which the transmission is made.

TEACH Act requirements that will likely fall within the duty of the Information Technology Officials:

11. Technological measures have been taken to reasonably prevent both:
 - Retention of the work in accessible form by students for longer than the class session; and

This provision does not mean the duration of a particular course (i.e., a semester or term), but rather is intended to describe the equivalent of an actual single face-to-face mediated class session (although it may be asynchronous and one student may remain online or retain access to the performance or display for longer than another student as needed to complete the class session). Flexibility is understood. The Committee expects that a common sense construction will be applied so that the copy will not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session.

This limitation only refers to retention of a copy in the computer of the recipient of the transmission. The material may remain on the server of the institution for the duration of its use in one or more courses, and may be accessed by a student each time the student logs on to participate in the particular class session of the course for which the digital version was made. (p.12)

- Unauthorized further dissemination of the work in accessible form by such recipients to others.

12. The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works.

13. The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.

14. The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made.

15. Any copies made for the purpose of transmitting the work are retained and solely used by the institution.

**taken from the Senate Committee on the Judiciary, Technology, Education and Copyright Harmonization Act of 200 Report to Accompany S. 487, 107th Congress, 1st sess., S. Rept. 31.*