Copyright Law and Distance Education:  
Overview of the TEACH Act

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Introduction

The “Technology, Education and Copyright Harmonization Act,” commonly known as the “TEACH Act,” was enacted by Congress in 2002 to permit limited uses of copyrighted materials in distance education or any other “transmission” of the copyrighted content to students. This provision is codified at Section 110(2) of the U.S. Copyright Act. The TEACH Act’s primary objective is to balance the protection of copyrighted works against the desire to use these materials for instruction in distance education. As a result, the law will allow many uses of materials, but only with restrictions.

This paper is intended to provide an overview of the TEACH Act for educators and others who are seeking to enjoy its benefits. Before embarking on this exploration of the law, keep these points in mind:

- The TEACH Act is relevant only if the materials in question are protected by copyright. Realistically, much of the material used in educational programs is protected under copyright law. Copyright protection vests automatically in nearly all original works of authorship. This protection applies even if the work lacks any form of copyright notice, registration, or other claim of copyright.
- The TEACH Act does not apply to works that are in the public domain, or not protected by copyright. Copyright protection today lasts for many years, but copyrights do eventually expire. Some works, such as works prepared by the U.S. government, are also in the public domain.
- The TEACH Act is potentially applicable to any “transmission” of the copyrighted content to students. The context may be a formal distance education course, or it may be materials posted on a server as homework in connection with a traditional course.
- The TEACH Act is relevant only to transmissions. If the instructor is “displaying” or “performing” materials in the traditional face-to-face classroom, Section 110(1) of the Copyright Act is a comparatively simple and generous provision applicable to such uses. If the instructor is making copies and handouts, fair use is likely the applicable statute.
The TEACH Act is not required. It is only one option. You may still look to fair use, or seek permission from the copyright owner, or pursue any other alternative for providing lawful access to the materials.

The TEACH Act carves out specific uses of works that are acceptable in a distance learning environment. The law becomes especially rigorous when materials are uploaded to websites, transmitted digitally, and easily downloaded, altered, or further transmitted. For many copyright owners, these are seen as a serious threat. As a result, Congress included numerous conditions and constraints in the TEACH Act.

Context of Distance Education

Although the TEACH Act is a clear signal that Congress recognizes the importance of distance education, the law is, nevertheless, built around a vision that distance education should occur in discrete installments, each within a confined span of time, and with all elements integrated into a cohesive lecture-like package. In other words, much of the law is built around permitting uses of copyrighted works in the context of “mediated instructional activities” that are akin in many respects to the conduct of traditional classroom sessions.

The law anticipates that students will access each “session” within a prescribed time period and will not necessarily be able to store the materials or review them later in the academic term; faculty will be able to include copyrighted materials, but usually only in portions or under conditions that are analogous to conventional teaching and lecture formats.

The TEACH Act also implicitly establishes a role for the educational institution, in addition to creating responsibilities more likely to fall on instructors. Consequently, the institution must impose restrictions on access, develop new policy, and disseminate copyright information. Because the law calls for institutional policymaking, implementation of technological systems, and meaningful distribution of copyright information, colleges and universities may well be inclined to deliver content on centralized systems. Within these parameters, however, the TEACH Act ultimately permits educators to make constructive use of many copyrighted works.

Requirements of the TEACH Act

The TEACH Act includes many conditions and requirements. While the law usually does not specify who is required to meet each requirement, tacitly the law calls on university officials, technology experts, and the instructor to have a role in implementing the law.

Role of Institutional Policymakers

1. Accredited nonprofit institution. The benefits of the TEACH Act apply only to a “government body or an accredited nonprofit educational institution.” In the case of
post-secondary education, an “accredited” institution is “as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education.” Elementary and secondary schools “shall be as recognized by the applicable state certification or licensing procedures.” Commercial entities and other for-profit organizations will not likely fit within the TEACH Act.

2. Copyright policy. The educational institution must “institute policies regarding copyright,” although the language does not detail the content of those policies. The statute suggests that the policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education. Proper authorities within the educational institution need to take deliberate and concerted action. While formalized policies are best, informal policies may suffice.

3. Copyright information. The institution must “provide informational materials” regarding copyright, and in this instance the language specifies that the materials must “accurately describe, and promote compliance with, the laws of United States relating to copyright.” These materials must be provided to “faculty, students, and relevant staff members.”

4. Notice to students. The institution must also provide “notice to students that materials used in connection with the course may be subject to copyright protection.”

5. Enrolled students. The transmission of content must be made “solely for . . . students officially enrolled in the course for which the transmission is made.” Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions.

Role of Information Technology Officials

1. Limited access to enrolled students. The new law calls upon the institution to limit the transmission to students enrolled in the particular course “to the extent technologically feasible.” Therefore, the institution may need to create a system that permits access only by students registered for that specific class.

2. Technological controls on storage and dissemination. An institution deploying “digital transmissions” must apply technical measures to prevent “retention of the work in accessible form by recipients of the transmission . . . for longer than the class session” and to measures to prevent recipients from “unauthorized further dissemination of the work in accessible form.” Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content. The law accordingly requires that the technological controls be "reasonable." In other words, do your best, and keep checking for the latest innovations. The notion of “class session” has stirred many questions. In general, it means that the student who properly accesses the materials will not maintain accessible copies after logging off the account. The student
may return to the materials repeatedly during the course, but not be able to have them backed up or stored in accessible form outside of the course context.

3. **Interference with technological measures.** The online delivery system used by the institution should not interrupt digital rights management code or other technological measures used by copyright owners to control their works.

4. **Limited temporary retention of copies.** The statute explicitly exonerates educational institutions from liability that may result from most “transient or temporary storage of material.” On the other hand, the statute does not allow anyone to maintain the copyrighted content “on the system or network” for availability to the students “for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.” Moreover, the institution may not store or maintain the material on a system or network where it may be accessed by anyone other than the “anticipated recipients.”

5. **Limited long-term retention of copies.** A separate statute, Section 112(f)(1), explicitly allows educational institutions to retain copies of their digital transmissions that include copyrighted materials pursuant to Section 110(2), provided that no further copies are made from those works, except as allowed under Section 110(2), and such copies are used “solely” for those transmissions.

**Role of Instructors**

To the extent that the TEACH Act places restrictions on substantive content and the choice of curricular materials, those decisions are usually best left to the instructor. Faculty members are best positioned to optimize academic freedom and to determine course content. The instructor, therefore, will need to select content of the type and in the amount permitted under the TEACH Act.

1. **Works explicitly allowed.** The following copyrighted materials may be used under the terms of the TEACH Act:

   - Performances of nondramatic literary works.
   - Performances of nondramatic musical works.
   - Performances of any other work, including dramatic works and audiovisual works, but only in “reasonable and limited portions.”
   - Displays of any work “in an amount comparable to that which is typically displayed in the course of a live classroom session.”

While these materials are specifically itemized in the law, they also leave some questions about definitions. Most of the terms used on this list are not defined in the law, deferring to general definitions or common practice.

One of the most troublesome questions about the TEACH Act is the concept of “portions” of audiovisual works. The law does not give any significant guidance, but a
report from the Congressional Research Service\textsuperscript{1} suggests that sometimes an entire audiovisual work may be allowed:

[T]he legislative history of the Act suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance. For example, the exhibition of an entire film may possibly constitute a “reasonable and limited” demonstration if the film’s entire viewing is exceedingly relevant toward achieving [an] educational goal; however, the likelihood of an entire film portrayal being ‘reasonable and limited’ may be rare.

2. \textit{Works explicitly excluded.} A few categories of works are specifically left outside the range of permitted materials under the TEACH Act. The following materials may not be used:

- Works that are marketed “primarily for performance or display as part of mediated instructional activities transmitted via digital networks.”
- Performances or displays given by means of copies “not lawfully made and acquired” under the U.S. Copyright Act, if the educational institution “knew or had reason to believe” that they were not lawfully made and acquired.

The first of these limitations is clearly intended to protect the market for commercially available educational materials. The second item is a gesture of honesty.

3. \textit{Instructor oversight.} The statute calls for the instructor’s participation in the planning and conduct of the distance education. An instructor seeking to use materials under the protection of the new statute must adhere to the following requirements:

- The performance or display “is made by, at the direction of, or under the actual supervision of an instructor.”
- The materials are transmitted “as an integral part of a class session offered as a regular part of the systematic mediated instructional activities” of the educational institution.
- The copyrighted materials are “directly related and of material assistance to the teaching content of the transmission.”

The requirements share a common objective: to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose.

4. \textit{Mediated instructional activities.} The TEACH Act defines this provision in two seemingly incongruous ways. First, it means that the use of the materials is integral to the course and under the instructor’s supervision. Second, it is defined to preclude an

instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be purchased by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace.

5. **Converting analog materials to digital formats.** Troublesome to many copyright owners was the prospect that their analog materials would be converted to digital formats, and hence made susceptible to easy downloading and dissemination. Some copyright owners have held steadfast against permitting digitization in order to control uses of their copyrighted materials. The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances:

- The amount that may be converted is limited to the amount of appropriate works that may be performed or displayed, pursuant to the revised Section 110(2); and
- A digital version of the work is not “available to the institution,” or a digital version is available, but it is secured behind technological protection measures that prevent its availability for a distance-education program.

**Librarians and the TEACH Act**

The TEACH Act does not mention librarians, but the growth of distance education and the complexities of the law can call for innovative library services. Within the framework of the TEACH Act, librarians may find many new opportunities to shape distance-education programs, such as:

- Librarians may participate in the development of copyright policy.
- Librarians may take the lead in preparing and gathering copyright information materials for the university community.
- Librarians may retain in the library collections copies of distance-education transmissions that the institution may make and hold consistent with the law.
- Many materials used in distance education will come from the library collections, and librarians may be called upon to locate and deliver to educators proper materials to include in the transmissions.
- Librarians often negotiate the licenses for acquisition of many materials.
- Librarians have many opportunities for offering alternative access to content that cannot be included lawfully in the distance-education programming.
- Librarians long have recognized the importance of fair use and often have a solid grasp of the doctrine; librarians to see opportunities for fair use when the TEACH Act does not apply.
- Librarians may research and track developments related to the TEACH Act, including policies, information resources, and operating procedures implemented at other educational institutions.
Conclusion

The TEACH Act is an opportunity, but implementing it can be an elaborate responsibility. The law is a benefit, but also a burden. Implementing the TEACH Act and enjoying its benefits will be possible only with concerted action by many parties within the educational institution. Because of the numerous conditions, and the limitations on permitted activities, many uses of copyrighted works that may be desirable or essential for distance education may simply be barred under the terms of the TEACH Act. Further, the TEACH Act may allow the desired uses, but the educational institution might not meet the policy or technology requirements. As educators consider the TEACH Act, they should be prepared to explore fair use and other alternatives when the new law does not yield a satisfactory result.

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I began this paper as an overview of the TEACH Act prepared at the request of the American Library Association for posting to the ALA website immediately after passage of the new law. That version of the paper, completed in late 2002, is available here: http://www.ala.org/Template.cfm?Section=Distance_Education_and_the_TEACH_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939#newc

I prepared a version of the paper for later publication here: “Copyright and Distance Education: Making Sense of the TEACH Act,” Change 35 (November/December 2003): 34-39.

I have continued to update and reexamine my overview of the law as a chapter in the book Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions (Chicago: American Library Association). The second edition of that book was published in 2006; the third edition should be available in late 2010 or early 2011.