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The TEACH Act: Higher Education Challenges for Compliance

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The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 expanded the scope of educators' rights to perform and display copyrighted works in digital online instruction, but more than a year after passage of the TEACH Act, it appears that relatively few institutions have implemented it.¹ This is most likely a result of the complexity of the law, the corresponding confusion on the part of instructors and administrators regarding its uses and limits, and the institutional investment in both time and resources necessary to implement the law. This research bulletin discusses the challenges related to helping faculty, administrators, and technical staff understand and balance the TEACH Act's uses and limitations. It also addresses practical considerations for determining when to make particular online instructional activities compliant with the TEACH Act's many conditions.

Highlights of the TEACH Act

The TEACH Act, passed on November 2, 2002, is an amendment to the copyright law.² It allows displays and performances of copyrighted works to be transmitted and used for instructional purposes, without permission of the copyright holder, if numerous conditions are met. It complements the so-called "face-to-face teaching" exception in the copyright law that allows educators to display and perform any copyrighted work—movies, videos, poems—in the classroom without permission of the copyright owner.³

TEACH arose from the recognition that the copyright law had not kept pace with the advance of the technology that enables today's any time, anywhere delivery of instruction via digital networks. Prior to the TEACH Act, the Copyright Act did contain a "distance education" exception, but it was rooted in the technology that enabled the distance education of a bygone era—closed circuit television. The "old" distance education exception allowed transmissions of performances or displays of certain works, but only simultaneously with the live delivery of instruction, and only to students in another classroom-type setting.

Clearly the old exception did not contemplate or address performances and displays of copyrighted works in today's distance education.⁴ It did not address asynchronous delivery of instruction, digitization of analog works for digital delivery, or the temporary copies of the material that reside on a student's computer during the course of digital instruction. For these reasons, Congress charged the U.S. Copyright Office with preparing a study of distance education and making recommendations for changing the exception to better address today's instructional technology and online instruction. The Copyright Office issued its report in May 1999.⁵

The TEACH Act enacted many of the Copyright Office's recommendations. The law is complex primarily because it represents a compromise between the educational community seeking to protect distance education activities and publishers and other copyright owners seeking to protect their works from the higher risk of copyright infringement facilitated by the use of digital networks. As a result, the educational

opportunities afforded by the new law are counterbalanced by significant practical challenges for institutions in implementing its provisions.

Educational Benefits of the TEACH Act

The TEACH Act is a way for educators to perform and display copyrighted works to enrich online instruction without going through the often time-consuming and expensive process of obtaining permission or negotiating a license to use each work. As discussed in more detail below, it supplements, rather than replaces, the copyright law's "fair use" exception that allows certain uses of copyrighted works without obtaining permission from the copyright owner.⁶ In comparison to fair use, which involves an individually tailored balancing of four qualitative factors for each use, the new TEACH Act exception is more of a "bright line" test in the sense that it is more like a checklist of factors that an institution either meets or does not in a particular instance. However, the requirements and limitations of the TEACH Act are significant, as indicated by the following list of prerequisites for TEACH Act coverage.

Institutional Requirements

- The benefits of the TEACH Act are limited to government bodies and accredited nonprofit educational institutions, as determined by a regional or national accrediting body.
- Institutions must have copyright policies and provide accurate information to faculty, staff, and students about copyright compliance. The policies should include guidelines for instructors who wish to incorporate copyrighted works into distance education course materials.
- Institutions must provide notice to students that works shown or displayed in distance education courses may be copyright-protected.

Protected Materials and Distance Education Activities

The TEACH Act allows only "nondramatic" literary or musical works (for example, poetry reading) to be performed or displayed in their entirety in distance education courses. Transmissions and performances of other works (such as films or videos) must be confined to reasonable and limited portions.⁷ However, works marketed primarily for performance or display in distance education settings cannot be used without permission under the TEACH Act exception. This category of works could include images or clips that are part of electronic textbooks (viewed through an e-book reader) that are marketed for use in distance education. Also excluded are copies of copyrighted works that were knowingly acquired or made in violation of copyright law. This could include, for example, copies of musical works obtained through a free peer-to-peer file-sharing service.

Digital performance or display must be part of "mediated instructional activities," meaning that the materials used must be an integral part of course, not ancillary to it. The materials must be of the type an instructor would show or play in a classroom, not materials that would ordinarily be watched or listened to outside of class. The TEACH

Act would therefore apply to an instructor's use of audio clips in a music class or images in a photography class, but not to an entire musical work or published collection of images assigned for listening or viewing outside class.

The instructor must control or supervise the distance education course and the transmission of any copyrighted works in connection with it. Constant or real-time supervision is not required, as long as he or she in fact controls the course, such as in the role of administrator of the course site on the Internet.

Institutions must implement technological controls that:

- Limit transmission of digital works to students enrolled in the course. In effect, this provision requires institutions to implement a system for limiting delivery to users authenticated as enrolled students.
- Limit users' retention of copyrighted works in accessible form to no longer than a "class session," a term that is unclear as used in the Act. The legislative history indicates that a "class session" refers to the period during which a student is "logged on to" the institution's server in connection with the performance or display, and not the entire duration of the course. It is therefore unclear, for example, whether materials posted during the first week of an online course could remain available to students in subsequent weeks when the class has moved on to other topics.
- Limit distribution of copyrighted works in accessible form to course participants.
- Do not interfere with technological measures already applied to materials to prevent retention and distribution, such as digital rights management controls.

Common Misconceptions about the TEACH Act and Copyright Law

In addition to the TEACH Act's numerous conditions and limitations,⁸ university administrators should be aware of some common misperceptions faculty or staff may harbor that further complicate adoption or use of the TEACH Act. Addressing these misconceptions is a critical part of positioning an institution to take full advantage of the TEACH Act.

- **The TEACH Act and Fair Use:** Because the TEACH Act, like fair use, is an exception to the copyright law's basic requirement that a user of a copyrighted work must obtain permission from the owner, some mistakenly believe that the TEACH Act replaces or modifies fair use. It is important to recognize, however, that the TEACH Act supplements fair use in a way that benefits higher education. The legislative history of the law expressly provides that the TEACH Act is not intended to limit or otherwise alter the scope of the copyright law's fair use doctrine.⁹ If a use of a particular work in a distance education setting is not covered by the TEACH Act, fair use principles may still allow it to be used without permission. For example, an instructor would need to rely on fair use (or

obtain permission) to post film clips or images for students to view on their own time outside of a class session.

- **The TEACH Act and Copying:** A related misconception is that the TEACH Act expands protection for unauthorized copying of copyrighted works for use in course packs, electronic reserves, and other printed course materials. This is not the case. The TEACH Act's primary purpose is to enable the performance and display of copyrighted works in the online classroom, parallel to how such materials are shown or displayed in a live classroom. The TEACH Act is only secondarily about copying and digitizing materials for online use, addressing only the transient and ephemeral copies of copyrighted materials as they are transmitted across a digital network and shown or played on the user's computer. The TEACH Act is not a substitute for having students buy or use textbooks or other course materials outside the classroom, such as through an electronic reserve system. Fair use principles, not the TEACH Act, determine whether an institution may copy materials for electronic reserve or for assembling coursepacks without permission of the copyright owner.
- **The TEACH Act and Course Management Systems:** The growth and adoption of course management systems may lead to a false sense of security on the part of faculty or administrators about copyright compliance in distance education activities. This misconception may take the form of "As long as I load my materials into a course management system like Blackboard or WebCT, I'm 'covered' for purposes of copyright compliance." However, a course management system (CMS) does not control many variables related to copyright compliance, such as how much of a protected work is transmitted and made available. Since most CMSs are browser-based, they typically lack the tools to control copying and downstream distribution of copyrighted materials as required by the TEACH Act.¹⁰ It is therefore necessary for faculty to understand that they must take appropriate steps to address copyright compliance before making copyrighted works available through a CMS.
- **Perception of the TEACH Act:** The TEACH Act may be misunderstood by faculty and administrators as yet another federal law imposing affirmative obligations that institutions must comply with, in the mold of the Health Insurance Portability and Accountability Act (HIPAA) and the Gramm-Leach-Bliley Act. This misconception can lead to hesitancy and mistrust on the part of faculty and others who might reap its benefits. The TEACH Act is more appropriately viewed as a helpful tool—albeit with significant limitations and restrictions—for achieving copyright compliance in distance education activities. It is a matter of individual choice whether to rely on the protection afforded by the TEACH Act.

What It Means to Higher Education

Positioning an institution to benefit from the TEACH Act requires significant investment of time and resources. To decide whether implementing the TEACH Act is worth the

effort at a particular institution, it is advisable to perform an analysis of the costs and benefits of compliance with the law. The analysis should address

- the role of distance education in the institution's overall delivery of instruction;
- the likelihood of success in marshalling the necessary coordination of effort among faculty, administration, and IT staff, including whether existing organizational resources (for example, the campus library) and institutional procedures (for example, institutional copyright policies) can be built upon to meet TEACH Act requirements; and
- the feasibility of implementing the necessary technological controls.

A Threshold Question: Does the TEACH Act Fit into Institutional Distance Education Activities?

Several factors may enter into the decision to commit time and resources toward adopting TEACH Act requirements. An institution's initial assessment should address the following issues in some way:

- The institution should review the extent to which it relies on distance education in its overall delivery of instruction. Is online instruction being used in place of face-to-face instruction in the classroom or primarily as a supplement to live instruction? Since the primary purpose of the TEACH Act is to enable distance education to be more like face-to-face instruction, distance education that replaces face-to-face instruction is more likely to require transmissions of performances or displays of copyrighted works and is therefore more likely to benefit from TEACH Act protection.
- The institution should determine to what extent particular courses depend on displays or performances of copyrighted works as an integral part of the course. Graphics-intensive courses such as architecture, art, or film that involve more in-class performance or display of copyrighted works are more likely to benefit from the TEACH Act than are text-intensive courses that rely less upon performances and displays in class.
- The institution should examine the attributes of the content being used for distance education activities. For example, a course that incorporates clips from new films or popular music may be more likely to attract the attention of unauthorized users seeking to obtain the works illegally, thereby putting the institution at greater risk for copyright infringement than a course that incorporates older film clips or music. The institution must be prepared to implement strong technological controls to protect "attractive" works from unauthorized use or distribution. In addition, digital versions of some works also may include various digital rights management controls ("built-in" copyright controls) that limit usage and distribution of the work (for example, limiting the number of times a music file can be played). The law prohibits users from circumventing these built-in controls. An instructor would need to evaluate

whether such controls would prevent using the works in the way he or she wants in an online course.

- The institution should weigh the costs of obtaining permission for desired transmissions of copyrighted works against the costs of implementing the TEACH Act. In some cases, obtaining permission to use some categories of works, rather than relying on an exception to the permission requirement like the TEACH Act, may be economically feasible, both in terms of staff time in finding the appropriate licensor and in paying the applicable license fee. For example, some distance education courses may rely primarily on materials that are licensed through a library license, and transmission for distance education purposes may be within the scope of the applicable license. Alternatively, performance of a musical work in a distance education setting could be within the scope of an institutional license from one of the collective rights organizations for musical works such as Broadcast Music, Inc. (BMI), The American Society of Composers, Authors and Publishers (ASCAP), and the Society of European Stage Authors and Composers (SESAC). On the other hand, obtaining permission to use certain kinds of works may be too time-consuming or prohibitively expensive, especially in industries, such as the film industry, that are relatively unresponsive to the needs of distance education.¹¹ In the latter case, relying on a combination of the TEACH Act and fair use for transmitting such works may be more cost-effective both in terms of staff time and cost.

Coordination of Effort Required

Compliance with the TEACH Act is likely to require coordination among, at a minimum, faculty, IT administration and staff, and legal counsel. At many institutions, librarians have considerable expertise in copyright matters and have implemented copyright training programs for members of the university community. Faculty are unlikely to read and understand the law on their own, nor will they undertake development of necessary technological controls. It is therefore up to administrators and staff to educate faculty about the benefits and obligations of the law and demonstrate the feasibility of creating a course that meets TEACH Act requirements. The good news is that many institutions are apt to have at least the basic framework for coordination in place as a result of other faculty training activities.

While an institution could undertake a separate TEACH Act educational program, it is more advisable to incorporate TEACH Act principles into its existing copyright education activities. Another alternative would be to introduce the TEACH Act as part of training faculty about how to use course management tools at the institution. Similarly, it is likely that many institutions will find it unnecessary to develop new institutional copyright policies and educational resources as required by the TEACH Act, since such policies and resources are necessary in other contexts, such as to avoid copyright infringement by acting as an Internet service provider for faculty and staff.

Implementing Appropriate TEACH Act Technological Controls

Perhaps the most uncertain part of the TEACH Act is its requirement that institutions implement technological controls to limit storage and downstream use and distribution of hosted content. The law requires technology that “reasonably” prevents students from saving, copying, and distributing protected materials. Although what is reasonable will vary depending on the circumstances and the type of material used, taking advantage of the TEACH Act will require the institution to examine and evaluate the feasibility of various technological measures. It will be necessary for IT staff to assist faculty in selecting and deploying appropriate technological measures.¹²

It is unlikely that the TEACH Act’s authentication requirements will pose a significant hurdle for most institutions. Most institutions have readily available means for limiting transmission of digital content to enrolled students, such as through passwords, a public key infrastructure application, or other authentication system. Commercial CMSs also offer tools for securing materials in an area accessible only to enrolled students.

The more challenging aspects of the TEACH Act are employing reasonable measures limiting copying, retention, and redistribution of hosted content. The TEACH Act does not specify what technological measures are currently “reasonable.” What is reasonable today may not be reasonable in the future as technology evolves. Although a wide array of proprietary digital rights management (DRM) systems are currently available in the market,¹³ their effectiveness has not been adequately tested in educational settings. Less stringent measures are, at least for now, sufficiently effective and affordable to be considered reasonable. A combination of some of the following measures is likely to meet TEACH Act requirements:

- Using “availability” settings in a CMS to limit how long hosted content is available to enrolled students. As noted above, however, determining how long is appropriate is more problematic due to the TEACH Act’s unclear definition of what constitutes a “class session” for which retention is permitted.
- Disabling “save,” “copy,” or other commands.
- Using streaming media for audio or video content, which, if properly configured, limits storage and distribution of content.
- Using access and use controls of common authoring tools such as Adobe Acrobat or Macromedia Flash.
- Using an electronic “shrinkwrapping” device that overlays a transparent image over the content, rendering it difficult to copy and redistribute.

Any of these methods should be coupled with the display of appropriate warning notices on the content notifying students that storage or distribution beyond set limits violates copyright law.¹⁴

Avoid Going Too Far with Technological Controls

Finally, educators should bear in mind that, despite the TEACH Act's requirements, technological controls have the potential for limiting otherwise fair uses of educational materials. Institutions should refrain from employing technological controls beyond what is reasonable or necessary to comply with the TEACH Act. TEACH Act compliance should not come at the expense of limitations on learning opportunities. This concern will gain importance as progress in DRM technology parallels advances in distance education. Specifically, distance education courses are increasingly being "built" using shareable, reusable components. Interoperability standards are evolving that will allow course modules to be used and shared independently of the platform or CMS in which the course was originally hosted or created. Educators are increasingly using repositories and referatories of educational resources to build online courses from smaller components or "learning objects."¹⁵ Applying unnecessarily restrictive technological controls to course components would limit their ability to be shared within and among institutions, frustrating these important trends in distance education.

Key Questions to Ask

- Are alternatives to the TEACH Act (namely, relying on obtaining permission and fair use) adequate to cover the institution's distance education activities?
- Is the institution prepared to undertake the required steps to educate faculty about the TEACH Act and other aspects of copyright compliance?
- How does the institution integrate the TEACH Act into its overall copyright compliance program?
- How does the institution intend to meet the technological requirements of the TEACH Act, and is it prepared to adapt its policies and practices as technology evolves?

Where to Learn More

- The TEACH Act is Pub. Law. 107-273, 116 Stat. 1758, Title III, Subtitle C § 13301, <<http://thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES>>. Sections 110 and 112 of the Copyright Act, as amended by the TEACH Act, can be found at <<http://www.copyright.gov/title17/92chap1.html>>.
- K. D. Crews, "New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act," <<http://web.archive.org/web/20021112205512/www.ala.org/washoff/teachsummary.pdf>>.
- G. Harper, "The TEACH Act Finally Becomes Law," <<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>>.

- North Carolina State University's TEACH Toolkit, <<http://www.lib.ncsu.edu/scc/legislative/teachkit/>>.

Endnotes

1. See D. Carnevale, "Slow Start for Long-Awaited Easing of Copyright Restriction," *Chronicle of Higher Education*, March 28, 2003, available online by subscription at <<http://chronicle.com/prm/weekly/v49/i29/29a02901.htm>>.
2. Pub. Law. 107-273, 116 Stat. 1758, Title III, Subtitle C § 13301, <<http://thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES>>. Sections 110 and 112 of the Copyright Act, as amended by the TEACH Act, can be found at <<http://www.copyright.gov/title17/92chap1.html>>.
3. Three excellent overviews of the TEACH Act are K. D. Crews, "New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act," <<http://web.archive.org/web/20021112205512/www.ala.org/washoff/teachsummary.pdf>>; G. Harper, "The TEACH Act Finally Becomes Law," <<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>>; and D. Drooz, "Copyright—The TEACH Act at One Year" (February 2004; unpublished manuscript, original on file with the author). See also North Carolina State University's TEACH Toolkit, <<http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html>>.
4. "Distance education" refers to instruction in which students are separated from their instructors by time and/or space, typically by means of digital technology. See U.S. Copyright Office, "Report on Digital Distance Education," May 1999, <http://www.copyright.gov/reports/de_rprt.pdf>.
5. See note 2 above.
6. The fair use exception is contained in Section 107 of the Copyright Act, 17 U.S.C. § 107.
7. The TEACH Act does not define "reasonable and limited." The legislative history of the Act indicates that "reasonable and limited" should take into account the nature of the market for the work and the pedagogical purposes of the performance. Senate Report No. 107-31, pp. 7–8, <<http://thomas.loc.gov/cp107/cp107query.html>>.
8. See § 110(2) of the Copyright Act as amended by the TEACH Act.
9. Senate Report No. 107-31, p. 14, <<http://thomas.loc.gov/cp107/cp107query.html>>.
10. As discussed in the section on "Implementing Appropriate TEACH Act Technological Controls," most CMSs do incorporate effective ways for limiting access to course materials to enrolled students via password or other log-on mechanism and for controlling the time period for which hosted content is available.
11. See G. Harper, "The TEACH Act Finally Becomes Law," <<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>>.
12. See the American Library Association's helpful paper on "Technological Requirements of the TEACH Act," <<http://www.ala.org/ala/washoff/WOissues/copyrightb/distanced/teachdrm.pdf>>, and other TEACH Act materials, <<http://www.ala.org/ala/washoff/WOissues/copyrightb/distanced/Default3685.htm>>.
13. In 2003, the U.S. Patent and Trademark Office issued a report to Congress identifying more than 100 DRM products that could be used for securing digital content.

14. D. Drooz and P. Hoon of North Carolina State University have developed excellent TEACH Act materials that discuss the current range of technological controls. See North Carolina State University's TEACH Toolkit, <<http://www.lib.ncsu.edu/scc/legislative/teachkit/>>.
15. See, generally, J. Hart and B. Albrecht, "Instructional Repositories and Referatories" (Boulder, Colo.: EDUCAUSE Center for Applied Research, Research Bulletin, Volume 2004, Issue 5, March 2, 2004), <<http://www.educause.edu/asp/doclib/abstract.asp?ID=ERB0405>>.

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