

# Copyright and Distance

BY KENNETH D. CREWS





# Education

## *Making Sense of the TEACH Act*

THE RECENT EFFORT BY CONGRESS TO BRING CLARITY TO THE ISSUES OF COPYRIGHT AND DISTANCE EDUCATION MAY HAVE GENERATED SOME SATISFACTION AMONG EDUCATORS. YET IT ALSO HAS PRODUCED AN ENTIRELY NEW ROSTER OF QUESTIONS AND HAS PLACED A NEW SET OF DUTIES ON EDUCATORS AND ADMINISTRATORS SEEKING TO DEVELOP ROBUST DISTANCE-EDUCATION PROGRAMS.

THE “TEACH ACT,” ENACTED AND SIGNED INTO LAW IN LATE 2002, ALLOWS A WIDE ARRAY OF USES OF COPYRIGHTED WORKS—WITHOUT RISK OF COPYRIGHT INFRINGEMENT—BUT ONLY WITHIN DEFINED LIMITS AND ONLY IF THE INSTRUCTOR AND THE EDUCATIONAL INSTITUTION TAKE CAREFUL STEPS TO IMPLEMENT THE LAW. EDUCATORS ARE LIKELY TO TRY TO EMPLOY THE NEW LAW, KNOWING THAT INNOVATIVE TEACHING OFTEN DEMANDS THE USE OF COPYRIGHTED MATERIALS, AND REALIZING THAT DISTANCE EDUCATION IS A VITAL ELEMENT OF MODERN TEACHING. THE PROSPECTS ARE FORMIDABLE, BUT THE RESULTS MIGHT PROVE REWARDING.

---

*Kenneth D. Crews is the Samuel R. Rosen Professor of Law at Indiana University School of Law-Indianapolis and holds a joint appointment in the IU School of Library and Information Science. He also is director of the Copyright Management Center at Indiana University-Purdue University Indianapolis, [www.copyright.iupui.edu](http://www.copyright.iupui.edu). This article is based in part on a more detailed examination of the TEACH Act prepared by the author with support from the American Library Association, available at [www.ala.org/washoff/teach.html](http://www.ala.org/washoff/teach.html). Neither of these articles is a substitute for legal advice. Copyright 2003, Kenneth D. Crews. Permission is hereby granted to make copies for nonprofit educational purposes.*



## WHY BOTHER WITH COPYRIGHT?

Why should educators care enough about copyright to take on this new burden? Quite simply, nearly every text, sound, image, and other intellectual work is protected by copyright. The possibility of infringing someone's copyright occurs whenever educators clip and copy, upload and save, and download and transmit copyrighted works in the process of creating and delivering a course via distance education. In recent years, educational innovations often have been stymied by that looming threat of legal violations and severe penalties.

Yet using rich varieties of materials can be essential for quality teaching. A music course without sound clips is empty; a geography class without maps is a lost cause. Nearly every course relies on readings from journals, books, newspapers, and the Internet. Each of these examples may produce violations of copyright law—unless, of course, the educator has permission from the copyright owner or the use fits within a specific statutory exception.

The TEACH Act completely revises such an exception for the benefit of distance education. More fully known as the Technology, Education and Copyright Harmonization Act, the new law is codified principally in Section 110(2) of the U.S. Copyright Act, and one of its objectives is to strike a balance between protecting copyrighted works and permitting educators to use those materials in distance education. If educators remain within the boundaries of the law, they may use certain copyrighted works without permission from, or payment of royalties to, the copyright owner—and without committing copyright infringement.

Staying inside the boundaries is the challenge. The law is replete with detailed provisions that tacitly demand the active engagement of many participants inside an educational institution. Such issues in the past might have been left to some vague notion of “fair use” or, worse, largely ignored by administrators with the hope that individual instructors might give due attention to the law and keep everyone out of trouble.

The TEACH Act is likely to compel transformation of this relatively passive dynamic into a more formalized approach. Staying inside the boundaries of the law will likely become the concern of instructors, administrators, and many other members of the academy—and the decisions will directly affect the quality and vitality of distance-learning endeavors.

## THE VISION OF DISTANCE EDUCATION

The TEACH Act is a clear signal that Congress recognizes the growing importance of distance education, the significance of digital media, and the need to resolve copyright clashes. Indeed, the importance of distance education was underscored in a recent report from the U.S. Department of Education that revealed that enrollment in college-level distance-education courses had doubled in a recent three-year period.

On the other hand, the TEACH Act signals that Congress's vision of distance education may not be as broad or as open

and flexible as many educators might desire, as revealed in the controls placed on uses of copyrighted works. For example, in order to assure that a copyright owner's materials will not be widely disseminated beyond a “classroom” context, the law requires technological controls on access. In order to prevent conflicts with the potential marketing of a work, the law permits uses of only portions of many types of materials.

Much of the law is also 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 may not necessarily be able to store the materials or review them later in the academic term.

Faculty will be able to include copyrighted materials in coursework, but usually only in portions or under conditions analogous to conventional teaching. Stated more bluntly, this

law is generally not intended to permit scanning and uploading of lengthy works to Web sites for unlimited access.

Some requirements of the TEACH Act suggest that institutions may need to centralize distance-education decision-making and delivery. For example, many provisions explicitly call upon the institution, rather than the instructor, to impose restrictions on access, develop new policy, and disseminate information about copyright. The institution also will need to take a leadership role in assuring that proper technology is in place and that instructors are making appropriate selection and use of educational materials.

One important implication of the TEACH Act is undeniable: No one person acting alone is able to comply with the law. The law requires institutional policies, distribution of copyright information, implementation of technological controls, and

adherence to the “portion” limits of allowable materials. While educational institutions in the past may have relied on instructors to follow the law, such hopeful expectations are unrealistic, if not simply impossible, under the new law.

## BENEFITS OF THE TEACH ACT

Given the significant and complicated implications of the new law, educators might understandably wonder if it offers any worthwhile advantages. A major benefit of the TEACH Act is its repeal of the earlier version of Section 110(2), a statute applicable to distance education, but which was drafted in an era of comparatively simple closed-circuit television programming. That statute was largely obsolete upon its enactment in 1976, and it was generally forgotten in the years since.

The earlier law could seldom apply to modern, digital transmissions that might use a range of materials aimed at reaching students at home, at work, and elsewhere. The new version of Section 110(2) offers several explicit improvements over prior law: an expanded range of allowable works; removal of restrictions on receiving locations; explicit allowance to store

**The possibility  
of infringing  
someone's copyright  
occurs whenever  
educators clip and  
copy, upload and  
save, and download  
and transmit  
copyrighted works....**



digital copies of course content; and explicit ability to convert analog works to digital formats.

## REQUIREMENTS OF THE TEACH ACT

The nature of copyright law is a quest for a steadily changing balance, and the TEACH Act is no exception. Congress strives for that balance by granting rights to use copyrighted works, while setting limits and conditions on the permitted activities. The law seeks to encourage certain uses as it simultaneously seeks to protect the interests of copyright owners.

One fundamental requirement demonstrates this point directly. The TEACH Act applies only to a "government body or an accredited nonprofit educational institution." In general, colleges and universities accredited by a recognized agency, or elementary and secondary schools recognized under state law, will qualify easily. For-profit entities are outside the law's ambit.

With this one requirement, Congress has demonstrated that it favors nonprofit education, but has protected the market for copyrighted works among commercial users. Other examples of such conceptual and pragmatic balancing run throughout the details of the TEACH Act. Most of the balance resides in the limits that the law sets on users' rights.

The limits and conditions in the TEACH Act can be generally grouped into three categories: institutional and policy requirements; technological requirements; and instructional/planning requirements. The benefits of the law can apply only when all of the relevant conditions have been met.

### INSTITUTIONAL AND POLICY REQUIREMENTS

The TEACH Act mandates that various policies, information resources, and notifications about copyright be in place. Because these requirements involve matters of institutional policy, depend on careful interpretation of the law, and apply throughout all distance-education programming, they are most likely to fall within the realm of deans, directors, legal counsel, or other central administrators.

**Copyright policy.** The new law requires educational institutions to "institute policies regarding copyright." Although the statute does not offer many details, one can surmise that the policies would detail standards for incorporating copyrighted works into distance education.

Policy development can be a complicated process, involving lengthy deliberations and multiple levels of review and approval. Such formal policymaking may be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement. In any event, proper authorities within the educational institution need to take deliberate and concerted action.

**Copyright information.** The institution must "provide informational materials" regarding copyright. In this instance, the language specifies that the materials must "accurately describe, and promote compliance with, the laws of the United

States relating to copyright." These materials must be provided to "faculty, students, and relevant staff members."

Institutions might consider developing Web sites, distributing printed materials, or tying the information to delivery of the distance-education program. Regardless, more educational institutions will need to devote time and attention to formulating fresh materials and communicating broadly a meaningful understanding of copyright law.

**Notice to students.** The statute further specifies that the institution must provide "notice to students that materials used in connection with the course may be subject to copyright protection." This notice may be a brief statement simply alerting students to copyright implications.

The notice could be included on materials distributed in the class or perhaps on an opening frame of the distance-education course or in a "pop-up" box on the course Web site. Taking advantage of electronic delivery capabilities, the educational ma-

terials might include a brief notice about copyright, with an active link to more general information resources.

### TECHNOLOGICAL REQUIREMENTS

New technologies may be driving much of the growth of distance education and the potential for copyright infringements, but the TEACH Act also exploits technological innovation to inhibit the abuse of copyrighted materials. The law requires institutions to develop and implement a variety of technological methods for controlling access to, and furthering the dissemination of, the copyrighted works.

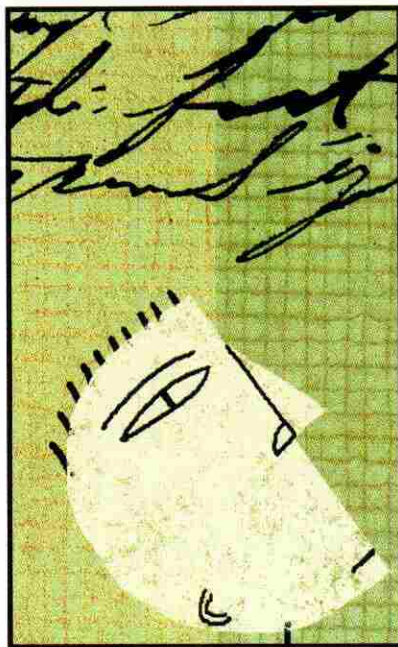
**Limited access to enrolled students.** The new law calls upon the institution to limit the transmission of copyrighted materials to students enrolled in the particular course "to the extent technologically feasible." The institution may need to cre-

ate a system that permits access only by students registered for that specific class. As a practical matter, educational institutions may link technological controls on access to enrollment records from the registrar's office.

**Technological controls on storage and dissemination.** The TEACH Act applies to a wide variety of means for delivery of distance education, but a few provisions apply only in the case of "digital transmissions," and thus not to analog delivery systems, such as conventional television and the like. For digital delivery, the institution must apply technical measures to prevent "retention of the work in accessible form by recipients of the transmission...for longer than the class session."

The statute offers no explicit definition of a "class session," but scattered language in the statute suggests that any given transmission would be confined to a finite time, after which students would be unable to access it. Also, in the case of "digital transmissions," the institution must apply "technological measures" to prevent students from engaging in "unauthorized further dissemination of the work in accessible form."

These restrictions on copying and further sharing of materials address serious concerns from copyright owners. On the





other hand, many technology experts question whether these technological fixes are even possible. Once content reaches the student's computer, little can prevent some means of downloading or copying the materials. Once stored, little can restrict further duplication and distribution. The U.S. Patent & Trademark Office has collected basic information about various protection systems on the market, but in the meantime educational institutions will need to find the best available means—even if imperfect—for complying with the law.

Various other technological requirements appear in the statute. For example, if the copyrighted content has restrictive codes or other embedded "management systems" to regulate storage or dissemination of the works, the institution may not "engage in conduct that could reasonably be expected to interfere with [such] technological measures." Yet the TEACH Act explicitly exonerates educational institutions from liability that may result from most "transient or temporary storage of material."

Finally, the act also amended Section 112 of the Copyright Act, addressing the issue of so-called "ephemeral recordings." The new Section 112(f)(1) explicitly allows educational institutions to retain copies of their digital transmissions that include copyrighted materials used pursuant to the new law. All of these provisions of the law create new responsibilities that will most assuredly become the domain of technology experts at the educational institutions.

## INSTRUCTIONAL AND PLANNING REQUIREMENTS

Of direct significance for the integrity of educational programs, the TEACH Act places parameters on the selection of substantive instructional content. Most decisions about course content are traditionally left to faculty members. They will most likely become instrumental in compliance with the law as they make crucial decisions about the selection and quantity of materials to incorporate into a distance-education course.

On the other hand, faculty members should maintain a primary focus on the quality of instruction. They need to bear in mind various alternatives for properly expanding the lawful use of copyrighted works (several of those strategies are outlined at the end of this article). Meanwhile, the TEACH Act poses some detailed limits.

Those limits are best understood by comparing them to previous law, which drew sharp distinctions between allowed and disallowed works, built upon the statutory concepts of "displays" and "performances." Displays are generally static images, whether of artwork, text, photographs, or other works; performances generally occur with the playing of music or audiovisual works and the recital of text, poetry, or plays.

Previous law allowed "displays" of any type of work, but allowed "performances" only of "nondramatic literary works" and "nondramatic musical works." Consequently, many dramatic works were excluded from distance education, as were performances of audiovisual materials and sound recordings.

The law was problematic at best. The TEACH Act expands upon existing law in several important ways.

**Works explicitly allowed.** The new law now explicitly permits the following:

- Performances of nondramatic literary works, such as readings from a novel, textbook, or poetry;
- Performances of nondramatic musical works, such as playing a recording or actually performing anew a pop song or symphony;
- Performances of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions;" and
- Displays of any work "in an amount comparable to that which is typically displayed in the course of a live classroom session."

**Works explicitly excluded.** A few categories of works are specifically left outside the range of permitted materials under the TEACH Act:

- Works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks," leaving faculty to study the origin and marketing of individual works.
- 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 exclusions is clearly intended to protect the market for commercial educational materials. For example, specific materials are available through an online database, or are marketed in a format that may be delivered for educational purposes through "digital" systems.

The TEACH Act generally steers users to those sources, rather than allowing educators to digitize or upload their own copies. The second exclusion is simply meant to keep users honest. If an instructor suspects an unlawful pedigree for a work coming into his or her possession, that material is best left out of the educational experience.

**Instructor oversight.** The statute calls for the instructor's participation in the planning and conduct of the distance-education program and the educational experience as transmitted. An instructor seeking to use materials under the protection of the new statute must adhere to these additional 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; and
- The copyrighted materials are "directly related and of material assistance to the teaching content of the transmission."

These three 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 other purposes.

Legal limits also mean that many uses of copyrighted works, although desirable or essential for effective teaching, may simply be outside the scope of the TEACH Act.



**Mediated instructional activities.** In perhaps its most convoluted—and possibly most important—language, the TEACH Act directs that performances and displays that involve a “digital transmission” must be in the context of “mediated instructional activities.”

This language means that the uses of materials in the program must be “an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting.” The statute further specifies that “mediated instructional activities” do not encompass uses of textbooks and other materials “which are typically purchased or acquired by the students.”

One point of this language is to prevent an instructor from including in a digital transmission copies of materials that are specifically marketed to students and meant for use outside of the classroom in the traditional teaching model. For example, the law would 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.

Not entirely clear is the treatment of other materials that might ordinarily constitute handouts in class or reserves in the library. The boundaries of a “class experience” may well embrace such materials. However, recall another provision that allowed displays—including displays of pages of text—only in a quantity similar to that which would be displayed in the live classroom setting.

That language suggests that occasional, brief handouts—perhaps including entire short works—may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of the TEACH Act.

**Converting analog materials to digital formats.** Trouble—some 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.

The TEACH Act takes a cautious approach and allows conversions only in quantities allowed for performance and display in the course, and only if a digital version of the work is not “available to the institution.”

As a practical matter, educators again need to make decisions in the context of specific limits of the law, and they may need to investigate the availability of alternative digital materials before scanning and digitizing anew.

## CONCLUSION

The TEACH Act is an opportunity, but also a responsibility—a benefit, as well as a burden. It also foretells a major shift in the administration and implementation of innovative distance education. Multiple parties within the college or university will need to participate; central administrators will likely have

a role of growing importance; instructors will need to develop courses with attention to the limits on the range and quantity of allowable materials.

In the end, legal limits also mean that many uses of copyrighted works, although desirable or essential for effective teaching, may simply be outside the scope of the TEACH Act. In anticipation of those limits, educators should be prepared to explore alternatives. Some possibilities:

- Employing alternative methods for delivering materials to students, including the expansion of innovative library services that could acquire and deliver resources through databases and retrieval systems available to students.
- Securing permission from copyright owners for the use of materials beyond the limits of the law.
- Applying the law of “fair use,” which may allow uses beyond those detailed in the TEACH Act.

At a time when the TEACH Act apparently has become the new alternative to “fair use,” that earlier doctrine, ironically, is taking on growing importance. A congressional report accompanying the TEACH Act emphasized that fair use remains an alternative for the lawful uses of copyrighted works in distance education.

Fair use is an inherently flexible legal doctrine, and its boundaries depend on a balancing of four factors listed in the statute. The law is open to broad interpretation, and its meaning is subject to steady debate and confusion. By comparison, the TEACH Act offers considerable clarity and certainty about legal rights of use.

Nevertheless, the flexibility of fair use is its greatest strength. The law of fair use may be rooted in centuries of judicial rulings, but it remains ready for application to the newest needs and technologies, including the most innovative distance-education programs. It is also applicable to a full range of materials, including works that are excluded under the TEACH Act. Fair use has potential applications where the TEACH Act does not reach.

The extent to which fair use applies, however, is a complex issue and requires far greater analysis than any one short article can allow. Nevertheless, for educators to develop the most robust educational programs, they need to rely on clips and pieces and sometimes entire copies of works that are protected by copyright law.

The ability to resolve the copyright issues—and to pursue the most progressive educational model—means that college and universities must have at their disposal a considerable range of support and resources. They need to apply the TEACH Act when possible; they need to be prepared for alternatives as outlined above, and to seek permission for uses beyond those allowed by law.

Educators also need to keep a fresh and evolving understanding of fair use ready to fill in the gaps in the law and to advance innovations in teaching and learning that no specialized statute can possibly anticipate. None of these promising results can occur without active engagement from all members of the educational community. ☐



Copyright of Change is the property of Heldref Publications and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.