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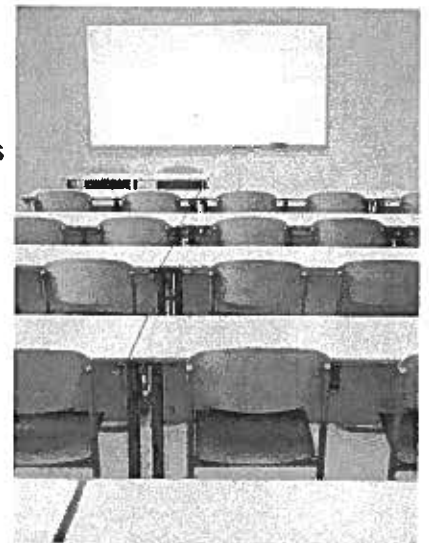
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TEACH ACT: STAYING TRUE TO FORM

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When the TEACH Act was passed in 2002, the law was intended to allow the Copyright Act to catch up with the remarkable technological changes in distance learning. Originally conceived for an era of closed circuit TV, the 1976 Act's distance learning exemption for educational institutions allowed the transmission or broadcasting of copyright materials to remote locations without liability. Students monitoring or participating in courses outside the classroom where the teacher was located required a special rule, lest there be a claim of copyright infringement.

With the TEACH Act, Congress grappled with the problem of computer networks, and the fact that rather than sending class performances via a wire to a screen located elsewhere on campus or at remote locations, education shifted to digital transmissions via the Internet. In that case, the performance or display occurred on computers wherever the student chose to be, and whenever they chose to review the materials, i.e. digital distant, asynchronous learning. The challenge in updating the law was to ensure that students and faculty would treat performance or display of copyrighted materials "as if" they were in the same classroom at the same time, while respecting legitimate interests of copyright owners. Among those interests was the need to ensure that if the copyright owner created a work expressly for use by multiple students in a digital distance learning program, neither the school nor the student could exploit the exemption to the financial detriment of the copyright owner. Also, certain copyright owners, in particular representatives of motion picture producers, argued that their works were not designed and were rarely used in their entirety in a single class session. For example, a two-hour movie cannot be shown in a 50 minute class. Therefore, the TEACH Act carved out a limitation that only "reasonable portions" of certain works (typically only a few minutes of a motion picture work) would be made available for digitizing and use.



**SPECIAL POINTS
OF INTEREST:**

- **Highlights with Commentary;**
Works Affected;
Rights Affected;
Eligible Parties;
Mediated Instructional Activities; Policies;
Temporary Storage;
and Conversion from Analog to Digital

Beyond that, based on a growing concern about file sharing and unlicensed digital downloads, many digital works came with technological protection measures ("TPMs") designed to limit access. In the 1998 Digital Millennium Copyright Act ("DMCA"), an entirely new chapter of copyright law, laid out rules to prevent bypassing of TPMs. The DMCA corollary in the TEACH Act is that any institution that uses a digital work that has TPMs must maintain them and not engage in circumvention just to exploit the work in class. Since many motion picture DVDs include anti-copy code, a TPM known as Content Scrambling System ("CSS"), the use of motion pictures in a digital distance learning environment is further restricted.

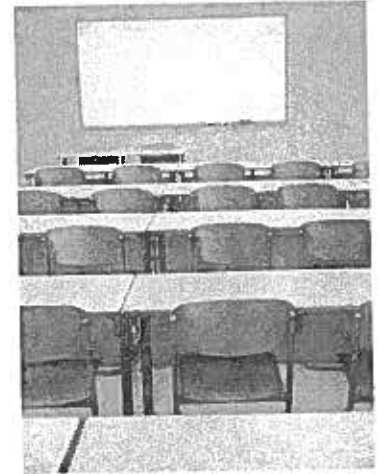
There were a series of lawsuits that challenged whether CSS violated the fair use provision of copyright law. In a number of rulings by courts and the Copyright Office, the conclusion reached was that CSS was a valid restriction on the copying of motion pictures, and the fair use provision did not grant users any right to bypass CSS in order to copy works. Further, for those that chose to take matters into their own hands and use software programs traded on the Internet which made CSS-protected works copyable, the defense of fair use would be unavailable. While no case expressly stated it, the exemption afforded educational institutions by the TEACH Act would, most likely, not provide an escape hatch from liability either.

With these notes as cautionary background and the awareness that the TEACH Act has now become a staple of many educational institutions' distance learning programs, it bears reminding all about the limitations and restrictions in the TEACH Act that make it not only a workable arrangement under copyright, but also a fair one for both the publishers and users.

Here are the highlights with commentary:

1. Works Affected: The TEACH Act permits all copyrighted works to be used in an online class, except those (a) "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted by digital networks" and (b) not lawfully made and acquired when the qualified institution knew or had reason to know that fact. Furthermore, uses of many digital works, such as motion pictures and audio-visual works, are restricted to reasonable and limited portions.

COMMENT: Much of the discussion above applies here. A few additional notes are in order. First, to protect the publishers, instructional activities that use digital works such as digital textbooks or digital course packs typically purchased by students for their use and retention (or at the K-12 level, for student possession and independent use) are not covered. Whether a specific textbook would normally be purchased for a class, as opposed to a section of it being made available as a supplement for an unrelated class, must be carefully addressed on a case-by-case basis.



The Digital Millennium Copyright Act laid out rules to prevent bypassing of technological protection measures.

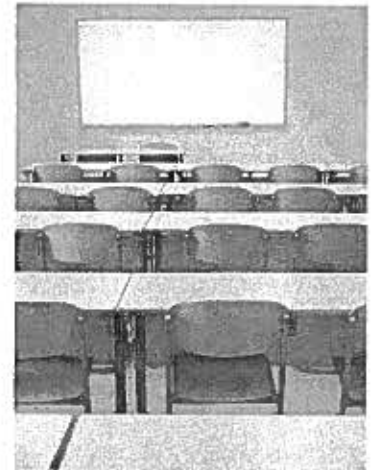
Second, the requirement that a work used must be “lawfully made” may have some catches. If one is using a work from a digital file that was secured via a license, it is very important to review the license agreement before incorporating that work into the distance learning program. The TEACH Act does not pre-empt contracts, and a “use license” may have provisions that reasonably restrict what can be done with materials. Further, fair use may be a factor in such cases, but it is important to understand that while the TEACH Act defines EXEMPT activities – meaning there is no liability whatsoever for the use – the fair use provision of copyright law is a DEFENSE to a claim of infringement. That means that the use is not exempt, but that there is other reason (the fair use equation) that justifies the use and thus allows the user to escape liability. In short, fair use will fill in a gap within the TEACH Act, but since fair use involves weighing of numerous factors, one cannot know for certain that the use will be deemed allowable. Careful analysis must be given in these cases.

2. Rights Affected: During the course of a transmission (a) performance of (i) non-dramatic literary or musical work or (ii) reasonable and limited portions of any other work and (b) display of any work in an amount comparable to that typically displayed in a course during a live class session.

COMMENT: The works covered in their entirety are limited to non-dramatic literary and musical works. For all other works, including motion pictures; photographs; dramatic works; pictorial, graphic and sculptural works, architectural works; sound recordings; and pantomimes and choreographic works, only limited portions can be used. It is important that the educational institution ensure that its teachers and students understand that only portions that would typically be performed or displayed in class be used under the TEACH Act exemption. This means that three minutes of a movie may be reasonable, but putting an entire, two hour movie online for class purposes, where the class is only 50 minutes, would not.

3. Eligible Parties: The exemption applies to (a) government bodies and (b) *accredited* nonprofit educational institutions, and students officially enrolled in the class.

COMMENT: For educators, only accredited, nonprofit educational institutions qualify. If a school is “for profit,” or not accredited, the rules do not apply. For example, home schoolers do not fit into this category, nor do schools not organized as a charitable institution under the IRS rules. For them, regular copyright clearances will be required. As to students, access to the works is limited to students formally entitled to be in a class. Typically, such students will be given an authorized password that permits access to the stored database of copyrighted materials. Notifying students not to share passwords is part of the appropriate policies discussed below, and rigorously enforcing access to enrollees is a requisite for the exemption.



It is important to ensure that only portions that would typically be performed or displayed in class be used under the TEACH Act exemption.

4. Mediated Instructional Activities: “Mediated instructional activities” is a key term, which identifies activities that use qualified works as an integral part of the class experience. An instructor must control or actually supervise the uses (i.e. mediate). The uses must be analogous to those in a live class.

COMMENT: What if the “class” is essentially a posting of materials without a formal instructor asking questions or providing answers? If materials are made available to students who work at their own pace, review materials on their own (perhaps with a curriculum but no interaction with a teacher), and take exams without interacting with faculty, such a program would be outside the bounds of the TEACH Act. The posting of the copyrighted works for that class would not be exempt.

5. Policies: Eligible institutions must institute copyright policies and apply reasonably effective technological measures to prevent retention beyond the allowable periods and to prevent further unauthorized dissemination. In addition, the institutions must not engage in activities that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or further unauthorized distribution.

COMMENT: If a school relies on the TEACH Act to copy and post materials for distance learning purposes, but does not have posted copyright policies, there is a grave risk that the exemption will be lost. It is essential that schools develop and make readily available (online and in print) copyright policies summarizing the legal parameters of ownership and use. Failure to have such policies by now is both inexcusable and reckless.

6. Temporary Storage. Transient or temporary storage of materials is expressly allowed as part of the automatic, technical transmission process. Copying necessary to effectuate the exemption is covered by the amendment to the ephemeral recording exception in Section 112(f). Eligible institutions are allowed to make copies or phonorecords of works that are needed in the transmissions.

COMMENT: The issue of temporary storage raises the question of retention of stored files. The rules are not intended to create permanent digital files accessible without limit into the future. As a practical matter, the exemption allows for retention up to seven years (a long but not indefinite time). However, if materials are not being used from semester to semester, a shorter retention period is appropriate. Even though the institution may repeat a class a year or two later, the retention of the digital copies on the school’s server may be outside the scope of the law’s intent.

7. Conversion from Analog to Digital: The TEACH Act allows a qualified institution to convert works in analog form to digital, provided no digital version of a work is available, or that the only digital version



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available is subject to technological measures that prevent permitted uses.

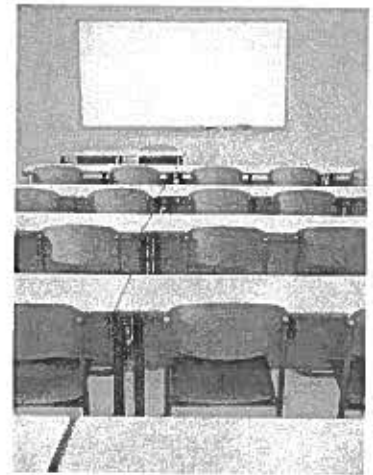
COMMENT: This clause may suggest that a school can take a DVD that is protected by CSS and copy a reasonable portion of it into its digital database without concern; however, that is not precisely what the law provides. The Catch-22 is that while the making of the copy may be allowable by reason of fair use, accessing the original digital files may require bypassing a TPM, which could be a DMCA violation. Because the DMCA is an independently actionable provision of copyright law, bypassing a TPM creates liability unrelated to the question of whether the making of the copy itself is allowed (for example by reason of fair use).

Well, there you have it. The benefits – and burdens – of the TEACH Act. While this exemption is an important and valued part of a school's ability to service students and faculty in an interconnected, digital era, it is not without important limitations. Limitations which if ignored can subject institutions to multiple and complex legal claims. So the better part of wisdom is to stay informed ... and Stay Tuned.

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TEACHING COPYRIGHT CURRICULUM

On May 27, 2009, the Electronic Frontier Foundation (EFF) launched its own "Teaching Copyright" curriculum and website to help educators give students the real story about their digital rights and responsibilities on the Internet and beyond. The Teaching Copyright curriculum is a detailed, customizable plan that connects students to contemporary issues related to the Internet and technology. The curriculum invites discussion about how creativity is enabled by new technologies, what digital rights and responsibilities exist or should exist, and what roles students play as users of technology. The website at www.teachingcopyright.org includes guides to copyright law, including fair use and the public domain. The Teaching Copyright curriculum was developed with the input of educators from across the U.S. and has been designed to satisfy components of standards from the International Society for Technology in Education and the California State Board of Education.



**New curriculum
gives students
the facts about
their digital
rights and
responsibilities**