

TEACH ACT FAQ

The TEACH Act of 2002 created a new exemption for the use of copyrighted materials in the world of online education. Today, the TEACH Act serves as the template for proper use of copyrighted materials via the Internet and programs like Zoom, MS Teams and the like. With the COVID-19 virus forcing the educational world to provide instruction remotely, familiarity with the TEACH Act rules is essential.

Q. What is copyright law?

A. Copyright law is federal statute based on language in the U.S. Constitution that protects the creative works of authors for “limited times” (which now reaches nearly a century and in some cases even beyond). Creative works include all content, fixed and tangible, like books, stories, articles, textbooks, software, sound recordings, film, photographs, graphs, drawings and paintings. On the one hand, copyright grants authors a set of “exclusive rights;” specifically, the right to copy a work, to publicly perform it, to publicly display it, to publicly distribute it and to prepare works derived from it, so the authors and their heirs can earn a living from their works, and in the case of sound recordings, to perform them digitally. On the other hand, the law sets forth a series of limitations or exceptions to the exclusive rights, so that the public good –education, teaching and research – can proceed with fewer inhibitions. Among the notable exceptions is the use of copyrighted materials in “face-to-face teaching” environments.

Q. What is the TEACH Act’s central purpose?

A. The TEACH Act is designed to bring the face-to-face teaching exception into the age of the Internet.

Q. What institution are “eligible parties” under the TEACH Act?

A. The exemption applies to “eligible parties,” defined as (a) government bodies and (b) accredited nonprofit educational institutions. Recipients of the transmissions must be students officially enrolled in a course or qualified officers or employees of governmental bodies. Non-accredited and for-profit institutions are not covered by the TEACH Act.

Q. What “rights” and “works” are affected by the TEACH Act?

A. The TEACH Act is a limitation on the copyright owner’s rights of public performance and public display of the author’s works during a transmission that is covered by the Act and the copying of the work to facilitate the transmission. The works that can be performed include (i) non-dramatic literary or musical works or (ii) reasonable and limited portions of any other work. The display of any work must be in an amount comparable to that typically displayed in a course during a live class session. Before 2002, the distance learning exception applied only to non-dramatic literary or musical works; movies and audiovisual works were outside the exemption.

With the TEACH Act, educators can transmit reasonable and limited portions of video content and audiovisual works.

Q. What is “mediated instructional activities” and why is that important?

A. For the TEACH Act to take effect, there must be an instructor who controls or supervises the uses of content, just like a teacher in a live classroom. **Mediated instruction is a key concept.** Since communications can be asynchronous and take place in dorm rooms, private residences etc., Congress insisted that an official member of the institution (such as a teacher) actually supervise the activities of students and use works just like in a live classroom experience. If no one monitors the use of copyrighted content, the exception does not apply. Because the copyright owners were very concerned about loss of control of content, if a faculty member is not supervising the persons who have access to a work and what is posted, then the institution may be liable for copyright infringements.

Q. What works are excluded from the TEACH Act?

A. Excluded from the works covered by the TEACH Act are 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. The main goals of these limitations are to ensure that the authors of works designed specifically for remote learning not lose their market, and that works not legitimately acquired not be used for TEACH Act purposes. If textbooks, course packs or audiovisual materials are produced for a specific class, then students in that class would either have to buy them, or its use would be subject to copyright law’s principle of fair use. Fair use (Section 107 of the Copyright Act) is a test that balances the interests of a user and an author. Fair use is not a bright line exception, but instead requires an analysis of four key factors - whether the use is for commercial or non-commercial purposes, the nature of the work exploited, the substantiality of the portion used in relation to the whole work, and the effect on the market for or value of the original work.

Q. What are other key requirements of the TEACH Act?

A. Eligible institutions must institute copyright policies and apply reasonably effective technological measures to prevent retention of works beyond the allowable periods and also prevent unauthorized further 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. 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 an amendment to another provision of copyright law, the ephemeral recording exception in Section 112(f); thus, eligible institutions are allowed to make copies or phonorecords of works that are needed in the transmissions. In addition, the institution can convert works in analog form to digital form if no digital version of a work is available, or if the only digital version available is subject to technological measures that prevent permitted uses.

As part of the bargain, institutions must make sure that downstream copying or distributions outside the class are not allowed, and they must have and enforce policies that prevent unauthorized uses of copyrighted materials. Technical measures should be used to assure this.

Further, if works come with technological protection measures embedded in them to prevent unauthorized distributions, those technological measures should not be tampered with. The institutions are given leeway to copy analog works onto a server and use them for the class, and they can retain works on institutional servers for the duration of the course.

Q. Any additional points to consider?

A. The TEACH Act ushered in a new regime for use of the Internet in qualified schools, and all parties need to be knowledgeable about its requirements. *Educational institutions* should review the details of the statute carefully and ensure that faculty, administrators and students know the requirements and actively comply. *Manufacturers providing equipment and software* to schools should work with institutions to make sure that their hardware and software complies with the TEACH Act's concerns, including (a) preventing non-qualified recipients from obtaining access to works; (b) ensuring that institutions prevent downstream transmissions (from qualified to non-qualified recipients); (c) ensuring that content owner's rights management programs are enforced (within the Act's limits) and (d) enabling digitization of analog content. *Video producers* should take steps to ensure that their works are TEACH Act-oriented. This means anticipating the kinds of uses that could be made of works in an online environment, incorporating digital rights management features as necessary, being responsive to school needs and monitoring for misuse of the exception.

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