

## **Copyright Checklist: Compliance with the TEACH Act**

### **Fair Use and Copyright Law**

The “Technology, Education, and Copyright Harmonization Act,” better known as the “TEACH Act,” is designed to provide educators more opportunity for the use of copyrighted works in distance education programs while still offering adequate copyright protection to those works.

In order to qualify for these further possibilities, educators must meet several requirements. As the responsibilities of the TEACH Act will most likely fall upon different entities within any one educational institution, this checklist should be used as an aid to organize and ensure compliance with the TEACH Act for each copyrighted work.

Remember, all requirements must be satisfied in order not to violate the law. For a more detailed explanation of any one requirement, click the “Explanatory Note” following each item. The principal text of the TEACH Act is enacted as Section 110(2) of the U.S. Copyright Act (available at: <http://www.copyright.gov/title17/>).

Keep in mind that if your project does not fit within the conditions of the TEACH Act, you have choices. Your use may be within “fair use” or another copyright exception, or you may secure permission from the copyright owner.

#### **I. TEACH Act requirements that will likely fall within the role of the Instructor:**

- The work transmitted is one of the following:
  - A performance of a nondramatic literary work; or
  - A performance of a nondramatic musical work; or
  - A performance of any other work, including dramatic works and audiovisual works, but only in “reasonable and limited portions”; or
  - A display in an amount comparable to that which is typically displayed in the course of a live classroom session. [Explanatory Note 1]
- The work is not marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity. [Explanatory Note 2]
- The work to be used is not a textbook, course pack, or other material in any media which is typically purchased or acquired by students for their independent use and retention. [Explanatory Note 3]

- The performance or display is:
  - Made by, at the direction of, or under the actual supervision of an instructor “as integral part of a class session offered as a regular part of the systematic, mediate instructional activities” of the educational institution; and
    - Is directly related and of material assistance to the teaching content of the transmission; and
    - Is an integral part of a class session offered as a regular part of the “systematic, mediated instructional activities” of the educational institution. [Explanatory Note 4]
- The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired. [Explanatory Note 5]
- If the work to be used has to be converted from print or another analog version to digital format:
  - The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
  - There is no digital version of the work is available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course. [Explanatory Note 6]

## **II. TEACH Act requirements that will likely fall within the role of the Institution:**

- The institution for which the work is transmitted is an accredited nonprofit educational institution. [Explanatory Note 7]
- The institution has instituted policies regarding copyright. [Explanatory Note 8]
- The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws. [Explanatory Note 9]
- The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection. [Explanatory Note 10]
- The transmission of the content is made “solely for . . . students officially enrolled in the course for which the transmission is made.” [Explanatory Note 11]

## **III. TEACH Act requirements that will likely fall within the role of the Information Technology Officials:**

- Technological measures have been taken to reasonably prevent both:
  - Retention of the work in accessible form by students for longer than the class session; and

- Unauthorized further dissemination of the work in accessible form by such recipients to others. [Explanatory Note 12]
- The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works. [Explanatory Note 13]
- The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients. [Explanatory Note 14]
- The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made. [Explanatory Note 15]
- Any copies made for the purpose of transmitting the work are retained and solely used by the institution. [Explanatory Note 16]

## **Explanatory Notes**

1. Previous law permitted displays of any type of work, but allowed performances of only “nondramatic literary works” and “nondramatic musical works.” 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 these several important ways.
2. The prohibition on the use of works that are marketed “primarily for performance or display as part of mediated instructional activities transmitted via digital networks” is clearly intended to protect the market for commercially available educational materials. For example, specific materials are available through an online database, or 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 the upload their own copies.
3. One purpose of the law is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. 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. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting (“mediated instructional activity”) would suggest 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 this statute.

4. The statute calls for the instructor's participation in the planning and conduct of the distance education program and the educational experience as transmitted. These 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.
5. Performances or displays given by means of copies "not lawfully made and acquired" under the U.S. Copyright Act are prohibited if the educational institution "knew or had reason to believe" that they were not lawfully made and acquired.
6. The TEACH Act allows the conversion of materials from analog into digital formats, under the following circumstances: the amount that may be converted is limited to the amount of appropriate works that may be performed or displayed 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 performing or displaying in the distance-education program. These requirements generally mean that educators must take two steps before digitizing an analog work. First, they need to confirm that the exact material converted to digital format is within the scope of materials and "portion" limitations permitted under the new law. Second, educators need to check for digital versions of the work available from alternative sources and assess the implications of access restrictions, if any.
7. 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." Most familiar educational institutions will meet this requirement.
8. The educational institution must "institute policies regarding copyright," although the language does not detail the content of those policies. The implication from the context of the statute, and from the next requirement about "copyright information," suggests that the policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education. For most educational institutions, policy development is a complicated process, involving lengthy deliberations and multiple levels of review and approval. Such formal

policymaking might be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement.

9. 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.”
10. In addition to the general distribution of informational materials, 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.” While the 5 information materials described in the previous section appear to be more substantive resources detailing various aspects of copyright law, the “notice” to students may be a brief statement simply alerting the reader to copyright implications.
11. The law requires that the transmission be “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.
12. While the transmission of distance education content may be conducted by diverse technological means, 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.” Also, in the case of “digital transmissions,” the institution must apply “technological measures” to prevent recipients of the content from engaging in “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.
13. If the content transmitted through “digital transmissions” includes 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.” While the law does not explicitly impose an affirmative duty on educational institutions, each institution may well review any technological systems to assure that systems for delivery of distance education do not interrupt digital rights management code or other technological measures used by copyright owners.

14. The transmission of content must be made "solely for . . . students officially enrolled in the course for which the transmission is made.:." In addition, the law also requires that the transmission be "for" only these specific students. 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. The new law also 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. As a practical matter, the statute may lead educational institutions to implement technological access controls that are linked to enrollment records available from the registrar's office.
15. 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."
16. Congress seems to have envisioned distance education as a process within a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law.

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## Copyright Law of the United States

*and Related Laws Contained in Title 17 of the United States Code*

[Complete version of the U.S. Copyright Law, October 2009 \[PDF format = 1.6 Mb\]](#)

- Preface: Amendments to Title 17 since 1976
- Chapter 1: Subject Matter and Scope of Copyright
- Chapter 2: Copyright Ownership and Transfer
- Chapter 3: Duration of Copyright
- Chapter 4: Copyright Notice, Deposit, and Registration
- Chapter 5: Copyright Infringement and Remedies
- Chapter 6: Manufacturing Requirement and Importation
- Chapter 7: Copyright Office
- Chapter 8: Proceedings by Copyright Royalty Judges
- Chapter 9: Protection of Semiconductor Chip Products
- Chapter 10: Digital Audio Recording Devices and Media
- Chapter 11: Sound Recordings and Music Videos
- Chapter 12: Copyright Protection and Management Systems
- Chapter 13: Protection of Original Designs
- Appendix A: The Copyright Act of 1976
- Appendix B: The Digital Millennium Copyright Act of 1998
- Appendix C: The Copyright Royalty and Distribution Reform Act of 2004
- Appendix D: The Satellite Home Viewer Extension and Reauthorization Act of 2004
- Appendix E: The Intellectual Property Protection and Courts Amendments Act of 2004
- 2009 Appendix F — Title 18 — The Prioritizing Resources and Organization for Intellectual Property Act of 2008
- 2009 Appendix G — Title 18 — Crimes and Criminal Procedure, U. S. Code
- 2009 Appendix H — Title 28 — Judiciary and Judicial Procedure, U. S. Code
- 2009 Appendix I — Title 44 — Public Printing and Documents, U. S. Code
- 2009 Appendix J — The Berne Convention Implementation Act of 1988
- 2009 Appendix K — The Uruguay Round Agreements Act of 1994
- 2009 Appendix L — GATT / Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement, Part II
- 2009 Appendix M — Definition of "Berne Convention Work"

This publication is also known as Circular 92.

Copyright Law of the United States of America is available in print for \$28.  
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## U.S. Copyright Office - Fair Use

One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law ([title 17, U. S. Code](#)). One of the more important limitations is the doctrine of “fair use.” The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

Copyright protects the particular way an author has expressed himself. It does not extend to any ideas, systems, or factual information conveyed in the work.

The safest course is always to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission.

When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation. The Copyright Office can neither determine if a certain use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.

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