

Copyright: The TEACH Act

Introduction

Copyright law provides educators with a **separate set of rights in addition to fair use, to display (show) and perform (show or play) others' works in the classroom**. These rights are in Section 110(1) of the Copyright Act and **apply to any work**, regardless of the medium.

Until recently, however, when the classroom was remote, the law's generous terms for face-to-face teaching in Section 110(1) shrank dramatically in Section 110(2) -- some would say to the vanishing point!

These severe limitations on what could be performed in distance education received lots of attention. In 1998, Congress directed the Copyright Office to prepare a report recommending what should be done to facilitate the use of digital technologies in distance education.

The Copyright Office prepared its report and recommended significant changes. The TEACH Act became law in late 2002.

The TEACH Act expands the scope of educators' rights to perform and display works and to make the copies integral to such performances and displays for digital distance education, making the rights closer to those we have in face-to-face teaching. But there is still a considerable gap between what the statute authorizes for face-to-face teaching and for distance education. For example, as indicated above, **an educator may show or perform any work related to the curriculum, regardless of the medium, face-to-face in the classroom** - still images, music of every kind, even movies. There are no limits and no permission required. **Under 110(2)**, however, even as revised and expanded, **the same educator would have to pare down some of those materials to show them to distant students** or make them available over the Internet to face-to-face students. **The audiovisual works and dramatic musical works may only be shown as clips** -- "reasonable and limited portions," the Act says.

This disparity, coupled with the considerable number of additional limits and conditions imposed by the statute, has led some educators to conclude that it's more trouble than it's worth to rely on Section 110(2). This statute's complexity provides a new context within which to think about fair use: compared to the many conditions and limits contained in Section 110(2), the four factor fair use test seems, well, simple and elegant. That's a good thing, because even if we rely on and find 110(2) helpful, fair use will still figure heavily in our exercise of performance rights because putting anything online requires making a copy of it. **The TEACH Act authorizes us to digitize works for use in digital distance education, but only to the extent we are authorized to use those works in Section 110(2), and** so long as they are **not available digitally in a format free from technological protection**. So, for example, where 110(2) authorizes the use of movie clips and the available DVDs don't permit ripping (a prerequisite to creating a digital "clip"), you can digitize those parts using an analog tape; but you are not authorized by the TEACH Act to digitize the whole movie. **Fair use is almost always going to be the best source of authority for making copies** in any context, but especially in conjunction with statutes like 110(2) that give us specific authorization that may not be sufficient in a particular case.

Fair use also remains important because the in-classroom activities (even if the classroom is virtual) the TEACH Act authorizes are a small subset of the uses of electronic resources educators may wish to make. It only covers **in class performances and displays, not, for example, digital delivery of supplemental**

reading, viewing, or listening materials. For those activities, as well as many others, we'll need to continue to rely on fair use. Remember, however, when relying on fair use, the fair use test is sensitive to harm to markets. This means that in general, where there is an established market for permissions, there will often be a narrower scope for fair use. In practical terms, this means that where it's easy to get permission, for example, to put text materials on reserve, our reliance on fair use should be limited; on the other hand, where it's near impossible to get permission, for example, for music and movies where those industries are not yet very responsive to the needs of distance educators, the scope of fair use expands to permit reasonable uses of such materials for both local and remote students. So, fair use will likely be very helpful for using music and movies in the classroom and as supplementary materials.

Section 110's role in the balance of interests has always been to permit educators to share works with their students, to show others' works in class. In its exclusion of meaningful rights for digital distance educators, Section 110 was failing to carry its weight, so to speak. It had been, in effect, "written out" of the statute by being obsolete. Now it has been expanded to permit educators to show materials the statute did not cover before; however, new Section 110(2) significantly limits who may display and perform how much of what materials and under what circumstances.

Section 110(2)'s expanded rights

1. **Transmitting performances of *all* of a non-dramatic literary or musical work.**
Non-dramatic literary works as defined in the Act exclude audiovisual works; thus, examples of permitted performances in this category in which entire works may be displayed and performed might include a poetry or short story reading. Non-dramatic musical works would include all music other than opera, music videos (because they are audiovisual), and musicals.
2. **Transmitting *reasonable and limited portions* of any other performance.**
This category includes all audiovisual works such as films and videos of all types, and any dramatic musical works excluded above.
3. **Transmitting displays of any work in *amounts comparable to typical face-to-face displays*.**
This category would include still images of all kinds.

Exclusions from Coverage

Not everyone, nor every work, is covered. Section 110(2) only applies to accredited nonprofit educational institutions. The rights granted do not extend to the use of works primarily produced or marketed for in-class use in the digital distance education market; works the instructor knows or has reason to believe were not lawfully made or acquired; or textbooks, course-packs and other materials typically purchased by students individually.

This last exclusion results from the definition of "**mediated instructional activities**," a key concept within the expanded Section 110(2) meant to limit it to the kinds of materials an instructor would actually incorporate into a class-time lecture. In other words, the **TEACH Act covers works an instructor would show or play during class** such as movie or music clips, images of artworks in an art history class, or a poetry reading. It does **not** cover materials an instructor may want students **to study, read, listen to or watch on their own time outside of class**. Instructors will have to rely on other rights they may have to post those materials, such as the fair use statute, or get permission.

Conditions:

In addition, the statute specifies a **formidable list of circumstances** under which the permitted institutions may make the permitted uses:

1. **The performance or display must be:**
 - a. A regular part of **systematic mediated instructional activity**;
 - b. Made **by, at the direction of, or under the supervision of the instructor**;
 - c. **Directly related and of material assistance to the teaching content**; and
 - d. For and **technologically limited to students** enrolled in the class.

2. **The institution must:**
 - a. Have **policies** and provide **information about**, and give **notice** that the materials used may be protected by **copyright**;
 - b. Apply technological measures that **reasonably prevent recipients from retaining** the works beyond the class session and **further distributing** them; and
 - c. **Not interfere with technological measures** taken by copyright owners that prevent retention and distribution.

Authority to make copies:

Finally, a new section was added to the Copyright Act to authorize educators to make the copies necessary to display and perform works in a digital environment. New Section 112(f) (ephemeral recordings) works *with* Section 110 to permit those authorized to perform and display works under 110 to **copy digital works and digitize analog works** in order to make authorized displays and performances **so long as**:

1. **Such copies are retained only by the institution and used only for the activities authorized by Section 110; and**
2. **For digitizing analog works, no digital version of the work is available free from technological protections that would prevent the uses authorized in Section 110.**

Because of the many limitations, Section 110(2) won't go far enough in many situations; remember that **educators still have recourse to fair use** to make copies, create derivative works, display and perform works publicly and distribute them to students. So, don't be discouraged by Section 110(2)'s scope and complexity. If it covers what you want to do and you and your institution can comply with all of its conditions and limitations, great! If it does not, you still have the fair use statute.

TEACH Act (Section 110(2) of the U.S. Copyright Law) Compliance Check

Instructor Information:

Name:

Email:

Phone:

Course:

Video Information:

Transmitted clips or “reasonable and limited portions” are allowable under prescribed conditions of the TEACH Act. In order to determine whether or not the request meets the requirements of the TEACH ACT the following information is required.

Please list the title(s) of the videos, who owns it, and the call numbers if video is from an NMC library:

Please provide the exact timing(s) for the video to be transmitted and/or the approximate total time(s) of the clip(s).

The TEACH ACT has requirements that distance education instructors must meet in order to legally transmit copyrighted materials. Please go through the checklist below to determine TEACH Act compliance for this course.

- Accredited nonprofit educational institution.
- Institutional copyright use policy.
- Educational materials on copyright available.
- Work is integral to class session.
- 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.
 - *NOTE: videos used in entirety will only be available for 7 days, after which time it will be closed.*
- The work is not marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity.
- 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.
- 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 a systematic mediated 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 “systemic, mediated instructional activities” of the educational institution.
- 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.
- 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 available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course.
- Reception limited to students enrolled in course.
- Warning notice to students present on work.
- Reasonable downstream controls instituted:
 - No retention of work longer than class session.
 - No dissemination beyond recipient.