



# The TEACH Act

## Finally Becomes Law

### 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. In March 2001, a bill was introduced closely tracking the Copyright Office's recommendations. It took almost 2 years, but the TEACH Act finally 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. 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, may lead 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 when 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 activities 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 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 permitted to become outdated and 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. "Ready to use the TEACH Act," below, summarizes the 22 (!) prerequisites. Nevertheless, we may be optimistic that, **together with fair use**, this new statute will achieve Congress' goal of facilitating the use of digital technologies in distance education.

### Section 110(2)'s expanded rights include the following:

#### 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, coursepacks** 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.

### Conditions:

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

#### 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 and, for University of Texas institutions, our [Rules of Thumb \(UT System guidelines\)](#).

**So, use this handy checklist to see whether you are ready to use the TEACH Act:**

- My institution is a nonprofit accredited educational institution or a governmental agency
- It has a policy on the use of copyrighted materials
- It provides accurate information to faculty, students and staff about copyright
- Its systems will not interfere with technological controls within the materials I want to use
- The materials I want to use are specifically for students in my class
- Only those students will have access to the materials
- The materials will be provided at my direction during the relevant lesson
- The materials are directly related and of material assistance to my teaching content
- My class is part of the regular offerings of my institution
- I will include a notice that the materials are protected by copyright

- I will use technology that reasonably limits the students' ability to retain or further distribute the materials
- I will make the materials available to the students only for a period of time that is relevant to the context of a class session
- I will store the materials on a secure server and transmit them only as permitted by this law
- I will not make any copies other than the one I need to make the transmission
- The materials are of the proper type and amount the law authorizes:
  - Entire performances of nondramatic literary and musical works
  - Reasonable and limited parts of a dramatic literary, musical, or audiovisual works
  - Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching
- The materials are not among those the law specifically excludes from its coverage:
  - Materials specifically marketed for classroom use for digital distance education
  - Copies I know or should know are illegal
  - Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session
- If I am using an analog original, I checked before digitizing it to be sure:
  - I copied only the amount that I am authorized to transmit
  - There is no digital copy of the work available except with technological protections that prevent my using it for the class in the way the statute authorizes

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