

## New Law Addresses Copyrights and Distance Learning

A new law, the Technology, Education, and Copyright Harmonization Act (TEACH Act), allows nonprofit educational institutions to use copyrighted materials for the purpose of distance learning without obtaining permission from the copyright holder and without paying royalties. To obtain these advantages, however, institutions must satisfy several specific requirements that will necessitate no small compliance effort. Before discussing those requirements, a summary of copyright law relating to distance education prior to the TEACH Act is in order.

Much of the material used by faculty in their classes, such as excerpts from articles, images, videotapes, computer programs, sound recordings, and artwork, is protected by copyright law. As a general rule, such material may not be used without the permission of the copyright holder. Therefore, unless faculty obtain such permission, using copyrighted material in the form of handouts, displays, or performances or uploading such materials to a website is a violation of the law and may subject the faculty member to civil penalties. There are however, statutory exemptions from this general rule in the Copyright Act.

The first exemption, found in section 110(1), is the so-called “classroom exemption.” To qualify for this exemption, a performance or display must 1) occur in a nonprofit educational institution; 2) be face-to-face, *i.e.* the faculty and students must be in the same place at the same time; 3) occur in a classroom or similar place devoted to instruction; and 4) be a lawfully made copy (if the work is an audiovisual work). Because of the face-to-face requirement, this section has no application to distance learning situations.

The second exemption, found in section 110(2), deals with performances and displays in the course of an instructional transmission, which has direct application to distance learning efforts. Just as the section 110(1) exemption includes several requirements that must be met before a user of copyrighted material can proceed without the permission of the copyright holder, section 110(2) mandates that an exemption for instructional transmission must satisfy several criteria. First, the transmission content allowed by section 110(2) is more restrictive than that allowed under the classroom exemption. The transmission may display any type of work, but performances are limited to non-dramatic literary and musical works. In addition, the transmission must be 1) part of the systematic instructional activities of a nonprofit educational institution; 2) directly related to and of material assistance to the teaching content of the transmission; and 3) made primarily for reception in a classroom or other place normally dedicated to instruction.

These requirements of the section 110(2) exemption pose two significant problems for those offering distance education courses. First, the restriction on content may require a teacher to alter the content of a course presented online (as compared with the content of a course presented in the classroom), a restriction that makes little sense from a pedagogical perspective. Perhaps an even greater problem, however is the requirement that the place of reception be limited to a classroom. Much of the appeal of distance learning is that a person can access the course from any convenient location, such as the person’s home. Section 110(2) reflects a concept of distance learning limited to closed circuit television transmissions. Clearly, the

exemptions to the copyright law found in sections 110(1) and 110(2) do not reflect the current state of technology or development of distance education from its early stages.

The TEACH Act, which repeals the old section 110(2) and replaces it with a new version, seeks to address these shortfalls in the prior law and still provide some protection for the rights of copyright holders. Nevertheless, the TEACH Act is not a blank check for the creation of a distance learning course without giving attention to copyright issues. Instead, the TEACH Act is a measured approach to the issue, one that contemplates a version of distance education that still closely resembles traditional teaching and lecture formats. The law is not designed to allow wholesale scanning or uploading of lengthy works, stored on a website, for students to access on a random basis throughout the course of a semester.

The TEACH Act offers several improvements to the old version of section 110(2). These improvements are:

An expanded range of allowed works. No longer are allowed works limited to certain defined categories. A few narrow classifications of works remain excluded, however, and certain types of works are subject to quantity limitations.

An expanded range of receiving locations. The TEACH Act does not limit transmissions to classrooms or other similar locations. Students may receive distance learning courses at any location.

A recognition of storage requirements. The TEACH Act allows institutions to record and retain copies of the instructional transmission. The Act also allows retention of content and student access for a brief period of time and permits copying and storage incidental to the technical features of distance learning transmission.

An allowance of digitization. The new law permits the digitization of analog works if the work is not already available in digital form.

These are the primary benefits of the TEACH Act. As might be expected, Congress did not confer these benefits without imposing some corresponding burdens. Some of the burdens imposed by the TEACH Act on an accredited nonprofit institution include the following:

The institution must develop a policy that specifies the standards to be followed when using copyrighted works in distance learning materials.

The institution must provide informational materials regarding copyright that “accurately describe, and promote compliance with, the laws of the United States relating to copyright.” These materials must be provided to faculty, students, and appropriate staff members. In addition, students must be given notice that the materials used in a distance learning course may be subject to copyright protection.

The transmission of distance learning course content must be limited to enrolled students “to the extent technologically feasible.”

The institution must install measures to ensure that any given transmission is accessible for only a finite amount of time and that students cannot access the material after that time. Also, the institution must use “technological measures” to prevent recipients from “unauthorized further transmission of the work in accessible form.”

The materials selected for transmission must be the product of instructor oversight. They must be transmitted “as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities” of the institution. In other words, the instructor must assure that the materials transmitted are for educational purposes and not for entertainment or other impermissible purposes.

Further complicating this matter is the Act’s failure to modify the doctrine of fair use as it applies to distance learning transmissions. Fair use is another exception to copyright law that allows the use of copyrighted material without the author’s permission if such use meets certain criteria. Fair use is a flexible, and in some ways uncertain, concept that considers the purpose and character of the proposed use; the nature of the copyrighted work; the amount and substantiality of the proposed use; and the effect the proposed use will have on the market for the work. These guidelines remain factors to consider in addition to the requirements of the TEACH Act whenever a faculty member constructs material for a distance learning course.

The Act includes a variety of other technical requirements that are beyond the scope of this article. Needless to say, the requirements imposed by the TEACH Act will provide new challenges for both administrators and faculty as the demand for distance learning opportunities continues to grow. More information about this new law will be provided in the future as UAH takes steps necessary to comply with the Act.