

Navigating copyright, fair use, and the TEACH Act in higher education | Viewpoint

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VIEWPOINT

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When hearing the words “copyright” and “higher education,” an instinctual first thought might be that all use of copyrighted works for teaching constitutes an educational fair use. However, this first thought unfortunately ignores many of the nuances of fair use and poses a risk of copyright infringement by professors and institutions. This risk is further heightened when copyrighted materials are used for online learning, where increased distribution and access may further shift the analysis against fair use. When designing a new online course, transitioning an in-person course to an online course, or simply posting materials for an in-person class online in a learning management system, professors must be especially careful of the types and amounts of copyrighted materials used in the online portion of the course.

Copyright law’s fair use doctrine is a statutory limitation on a copyright holder’s exclusive rights. The preamble of the copyright statute on fair use sets out criticism, comment, teaching, scholarship, and research as examples of permissible purposes. However, this list is merely illustrative, and a full fair use analysis requires a fact-specific review of the use along the following four factors:

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

Courts analyze the first factor as to whether and what extent the use is “transformative” or, as the Supreme Court stated, “adds something new, with a further purpose or different character,

altering the first with new expression, meaning or message.”

As an example of how this factor may weigh against fair use, despite the listed examples and further inclusion of “nonprofit educational purposes,” an educational use of an originally educational work is less likely to be considered transformative. Similarly, on the fourth factor, the market for an educational work is harmed when such work is used for teaching without permission.

Because of the complexity of performing a fair use analysis, representatives of educators, authors, and publishers met in 1976 to produce the “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions,” a set of guidelines intended to set a baseline understanding of the fair use factors and their application to educational uses. Similarly, in 1998, the Conference on Fair Use published the “Proposal for Fair Use Guidelines for Educational Multimedia,” which applied to the digital reproduction of various works in multimedia projects for use in classroom settings. However, despite these guidelines, the ultimate determination

on fair use is left to the courts, who have consistently messaged the need to analyze fair use on a case-by-case basis.

The complexity and uncertainty of a fair use analysis present a real issue for professors and institutions, especially when use of a large number of copyrighted works is proposed. The TEACH Act addressed these difficulties, specifically targeting the use of works in an online learning setting offered by accredited, non-profit institutions. It does so by providing specific requirements and permissions for use of copyrighted works in online learning. The Act breaks down into two primary categories of requirements:

- General requirements for institutions to be eligible under the Act
- The type and amount of a work allowed, and the manner in which such use is made.

However, despite its aim towards clarity, real world interpretation and implementation of the Act remains highly varied between institutions.

These variations in interpretation primarily stem from two of the TEACH Act's subsections:

The first is founded in the first exclusionary clause of the Act, namely, the exclusion of "work[s] produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks." Specifically, the

limitation "transmitted via digital networks" may be reasonably interpreted to limit either the "work produced or marketed primarily via performance or display" or "of mediated instructional activities."

Second, the TEACH Act applies to a performance or display that "is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of . . . an accredited nonprofit educational institution." However, the definition of the term "mediated instructional activities" itself is a cause of variation. The definition sets out: "[t]he term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention . . ." As opposed to the first source of variation, which may be conveyed as a "this or that" issue, the definition of the term "mediated instructional activities" spurs a great number of questions and possible interpretations. For example, does this definition serve to exclude an additional category of works and, if so, to what extent? One interpretation provides that use of any textbook, or similar work, is entirely excluded. Another provides that short excerpts of an unassigned or already

purchased textbook may be used for emphasis.

Despite ambiguities in the statutory language leading to various interpretations of the TEACH Act, the Act is successful in its original goal as an alternative to the classic fair use analysis. As opposed to a fair use analysis, which must be performed singularly on a case-by-case basis, an institution may set general policies based on a selected interpretation of the Act. Even where the decision is to avoid uses requiring interpretation and defer to a fair use analysis, the TEACH Act may still provide greater assurance for the permissibility of less questionable uses.

Understanding and navigating the complexities and nuances of copyright law, fair use, and the TEACH Act is crucial for professors and higher education institutions, especially those involved in online education. Because of the frequency and amount of copyrighted works used in higher education, developing effective and efficient policies and procedures on the use of copyrighted works lightens the burden of compliance and enables professors and institutions to maintain their focus on providing high quality educational experiences for students.

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