

## Evidence-Based Research Article

School of Counseling, Leadership, Advocacy & Design  
College of Education  
University of Wyoming  
Laramie, WY

### Abstract

During (and after) the lockdowns of the Covid-19 pandemic, educational communities have employed distance education to reach their students. However, not all districts are aware of the legal requirements of using instructional materials in a virtual setting. In recognition of the growth of virtual learning environments, Congress passed the Technology, Education and Copyright Harmonization (TEACH) Act in 2002 with the goal of redefining the circumstances and rules under which nonprofit and educational institutions might digitally use copyright protected materials. For districts exploring or expanding opportunities in distance education, understanding the laws that pertain to the use of digital, copyrighted materials is of critical importance. This article explores and explains these requirements for policymakers, site and district leadership, and classroom instructors.

### Keywords

copyright law, Fair Use, TEACH Act, distance education, legal education, education policy

In the winter of 2019, attorneys for the Houston Independent School District (HISD) found themselves in federal court (*DynaStudy, Inc. v. HISD*, 2017). They were finalizing their defense of the district against charges of infringement in violation of the Copyright Act and the Digital Millennium Copyright Act (17 U.S.C. § 501 et seq and § 1201 et seq.).

After a three-year legal battle, a federal jury found in favor of the DynaStudy textbook publisher in May of 2019 and awarded them \$9.2 million to be paid by the district. The HISD appealed the verdict, and the parties agreed to \$7.8 million as a final settlement of the case in October 2019 (Carpenter, 2019).

The examples of violations were egregious. They included cutting off the copyright warning from a study guide and then making multiple copies to share around the district as well as using a sticky note to hide the admonition against making copies. One teacher used white tape WR<sup>3</sup> K L G H F R S \ U L J K W Z D U Q L Q J V R Q an eighth-grade science guide, then circulated the document more than 50 times over two \ H D \ DynaStudy, Inc. v. HISD (2017).

Increasing the dist U L F W ¶ V Z R H V W K H L U R Z Q liability insurance company sued them for failure to disclose pertinent trial information. The company asked a judge to release them I U R P D Q \ R E O L J D W L R Q < R Q A e ð € À @ P P 6 ² ¥ ® Õ ¥ P ^ Z a > S 5 y . @ / a ! A % Ž p p W b





as blended or hybrid courses and that will return to that format once the crisis or emergency has abated. (para. 12)

For other districts, however, the incorporation of various forms of distance education may be here to stay. A 2021 study by the Rand Corporation offers insight regarding the future of distance education from representative school districts throughout the country. The research was centered around the I R O O R Z L Q J W i l k e n o t e W L + R Q <sup>3</sup> instruction outlast the coronavirus disease 2019 (COVID-

More concretely, in a face-to-face (f2f) class, an instructor might display a painting to the students in that specific classroom for a specific length of time. When the students leave class for the day, the image of the painting does not travel with them, and its use is confined to a set group in a set time period. Should that same class be provided in a distance education format and the image of the painting is added to course materials that are consistently accessible, little would prevent students in the course from downloading and then sharing the image outside of their virtual classroom or pirating the

F U H D W R U ↑ V R U L J L Q D O Z R U N

f2f class, exempting the teacher from needing specific copyright permission for each of the song excerpts that she played during her instruction.

However, prior to the TEACH Act, the following was true:

The attempt to standardize student learning experiences among f2f and distance education students while continuing to protect copyright laws was well-intentioned in design. However, \* U L J J V G H V F U L E H V <sup>3</sup> caveats not applicable to in-person teaching, including limitations on the extent of use for certain types of copyrighted works and the required adherence to a list of institutional and technical specifications and U H V W U L F W L R Q V ´ (p. 307).

Hutchinson (2003) provides a helpful vignette comparing copyright permissions before and after the TEACH Act, using the example of a History of Jazz: New Orleans class provided in both f2f and distance education formats. In the f2f class, students would likely purchase a textbook and the instructor would lead class discussions, using excerpts of various musical pieces during the class period to <sup>3</sup> L O O X V W U D W H H D F K H [ D P S O H V K H G H V F U L E H G G X U L Q J her lecture, stopping to point out specific features to which she wanted students to pay

S D U W L F X O D U D W W H Q W L R Q ´ S

The distance education version of this class might have students purchase CDs with the featured musical works to use as they studied at home. The fair use doctrine would apply to the







authorized people may access them, particularly after a specific course has been completed. As long as the materials are stored as prescribed by law, the institution may use the materials for future iterations of the course.

Moreover, the following practices should be in place for instructors in educational establishments that offer distance education:

- x Concerning the type and amount of work used, the TEACH Act differentiates between the display and performance of works. For display, the act says that use must be of an amount comparable to that which is typically displayed in the course of a live classroom session. The performance of dramatic and audiovisual works must be
- x Regarding course supervision, the copyrighted materials that are used must be part of a course that is directly supervised by the instructor and part of the regular course offerings of the institution. This regulation underscores that the materials must be for educational purposes and not used in any other manner (e.g., an entertainment capacity).
- x Concerning the digitization of instructional materials, questions can arise about if and how much

a teacher might be able to scan or otherwise digitize analog teaching materials to be placed online for a distance course. Understandably, this has been a sticking point for copyright holders, who fear that once their creations are converted to a digital format, they could be shared endlessly with little recognition or recompense. The TEACH Act does permit digitizing analog works if the works are not already available in digital form. In addition, commercial works marketed for the educational market, such as electronic texts or workbooks, cannot be used under the TEACH Act exemption. The same restrictions about the portions of material that could be used online would still apply.

Libraries have created a checklist to identify which of the TEACH Act guidelines have been met and which still might need to be completed to keep the institution and individual instructors in compliance with law. The checklist is presented in Appendix A



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## Appendix A

Use this handy checklist to see if you are ready to use the TEACH Act.