

Fair Use or Fair Game: The (Distance) Educator's Dilemma

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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 to “hide copyright warnings on an eighth-grade science guide, then circulated the document more than 50 times over two years” (*DynaStudy, Inc. v. HISD*, 2017).

Increasing the district’s woes, their own liability insurance company sued them for failure to disclose pertinent trial information. The company asked a judge to release them from any obligation to pay the district’s multimillion dollar settlement. The HISD board of education indicated that they intended to use general fund dollars to complete their payments (Carpenter, 2019).

The district’s defense of these actions was centered around the fair use doctrine, an allowance carved out of copyright law that grants unlicensed use of copyrighted materials in specific situations (United States Code: Copyright Act, 1976). The HISD personnel

involved in the lawsuit clearly had knowledge of copyright law, fair use, and the limitations that apply to education. This was demonstrated by an exchange of emails read aloud in court, through which a teacher mentioned the obvious wording that prohibited copying on the bottom of each student guide. Moreover, she described the response of her principal, “who brushed off the concerns, and the teacher’s reply *via email stating ‘I’m ok with violating it though . . . lol’*” (Cox, 2019, p.1).

Most educators do have some understanding of fair use but may believe that it offers wider immunity than the law actually allows. Copyright law extends automatic protection “in nearly all works that are ‘original works of authorship’ and ‘fixed in any tangible medium of expression’” (United States Code: Copyright Act, 1976, Section 102[a]). Interpreted for educational use, this means “most writings, images, artworks, videotapes, musical works, sound recordings, motion pictures, computer programs, and other works are protected by copyright law” (Crews, 2002, p. 2).

Is Fair Use Fair Game?

The phrase *fair game* became commonly used after its introduction from old English grouse hunters, who utilized the term to mean a wild game bird that fell within the rules of hunting and could be deemed fair or allowed as a target for a potential kill. The term has morphed over the years and now, according to Urban Dictionary, means something that is up for grabs and equally accessible to any participant or an opportunity that can be taken without repercussion (Andrea, 2003).

Fair use is codified in Section 107 of the Copyright Act (United States Code: Copyright Act, 1976) in slightly different terms than those used by Urban Dictionary, although the definitions do have some parallels around the

need to identify certain characteristics to ascertain fitness for use.

The Copyright Act describes four factors that should be considered when determining if the use of material would fall under permissible guidelines for fair use. They are (a) the purpose and character of the use and whether the use is of a commercial nature or for nonprofit educational purposes; (b) the nature of the copyrighted work and the level of creativity that the work expresses; (c) the amount and substantiality of the work that is used in proportion to the work as a whole; and (d) the effect of the use on the potential market value of the copyrighted work and to what extent the unlicensed use might harm the existing or future market for the copyright owner's original work (Copyright Act, 17 U.S. Code § 107, 1976).

Case law also provides some guidelines about how to honor a copyright and provide students with current and relevant instructional materials. Described as “the classic fair use and copyright infringement case” (Russo, 2010, p. 174), *Marcus v. Rowley* (1983) demonstrates how the court system viewed a specific fair use lawsuit in an educational setting. Marcus wrote a booklet for her adult education class and registered the copyright. Marcus sold her booklets to the students in her class for \$2 each and made a profit of \$1 for each book. Rowley, the defendant in the court case, took the class from Marcus and purchased a copy of the booklet. Shortly thereafter, Rowley produced her own guide to cake decorating for her high school classes.

As admitted in court, Rowley directly copied 11 of the 24 pages from the plaintiff's booklet in the guide that she created. Rowley did not give the plaintiff credit for the 11 pages she copied, nor did she acknowledge the plaintiff as the owner of a copyright with respect to these pages. Marcus became aware of the

copyright violation (through a student who had knowledge of both classes) and filed suit (*Marcus v. Rowley*, 1983).

The Ninth Circuit Court found Rowley to be in violation of copyright law. The court indicated that the defendant's nonprofit educational purpose did not automatically compel a finding of fair use and stated that copying a work for the same intrinsic purpose that the copyright owner intended weighs strongly against a finding of fair use (U.S. Copyright Office, 2022).

Hachiya (2022) describes the following three additional “tests” that educators might apply to further ascertain their own level of risk of copyright violation:

- **Brevity:** The actual number of words used in the copy should not include more than two pages or 250 words of a poem or an excerpt or more than 10% of a total work.
- **Spontaneity:** The decision to use the material was made too late to acquire permission.
- **Cumulative effect:** The work is used in only one course in the school, a single author is not copied more than twice, or a teacher uses multiple copies in one class no more than nine times in one class over a semester.

Legal Knowledge

The guidelines on how copyright and fair use can be applied in an educational setting—combined with the benefit of hindsight provided by examples of copyright violation case law—may inspire observers of these situations to wonder how such conspicuous infringements occur. Certainly, deliberate flouting of the law is one explanation. However, research studies reveal that this subject may not be focused on as

thoroughly as one might expect in either administrator/teacher preparation or district professional learning (given the legal and financial implications that accompany accusations and findings of copyright infringement).

Hillman (1988) determined that 76% of administrator respondents ($n = 142$) had taken a course about school law as part of their administrator preparation programs (p. 8). In the study completed by Militello et al. (2009), this number increased to 87% ($n = 424$). While Hillman (1988) did not ask specifically about copyright, Militello et al. (2009) included the following question about copyright law in their study: “True or False: Under copyright doctrine of ‘fair use’ teachers can duplicate 51 magazine articles and book chapters for their classes each year if no one is charged for the material” (p.33). Subsequently, 57% of respondents answered this question correctly as false.

Hillman’s (1988) work established that 58.4% of respondents relied on their school attorney for legal advice, followed by 41% who asked other administrators in their own districts when they had questions of a legal nature. These results have changed over time. Militello et al. (2009) determined that 59% of their respondents relied on central office personnel as their source of legal information, with the school district lawyer and other district administrators reaching a close second. The collegiality between administrators may be positive for culture, but reliance on peers for legal advice may not typically be the best practice when colleagues are uninformed about current laws and school district liabilities, including those concerning copyright law.

Circumstances appear even less promising concerning preservice and new teacher preparation and regarding

professional learning. Egger and Springer’s (2019) research on music educator knowledge and understanding about copyright law suggests that preservice and professional learning offerings to address legalities about copyright may be lacking in both scope and depth.

In this study ($n = 50$), the majority of respondents (64%) reported that copyright law was not covered in any of their preservice coursework, and 76% indicated that, once employed, their school and/or district had offered no information or training on copyright law (Egger & Springer, 2019). These results compel consideration regarding if and when districts address copyright guidelines via policy and professional learning opportunities. This matter is especially important as institutions consider expanding alternative ways of providing instruction.

Distance Education Enters the Fray

For school district personnel attempting (or not, as the case may be) to adhere to copyright law, a layer of complication was added with the growth of distance education provoked (in part) by school districts’ response to the Covid-19 pandemic.

As described by Hodges et al. (2020), for some districts across the nation, the use of online instruction might fall under the category of emergency remote teaching, which they define as follows:

- a temporary shift of instructional delivery to an alternate delivery mode due to crisis
- circumstances. It involves the use of fully remote teaching solutions for instruction or education that would otherwise be delivered face-to-face or

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 following question: “Will remote K–12 instruction outlast the coronavirus disease 2019 (COVID-19) pandemic?” They determined the answer to be yes—with some caveats and modifications (Diliberti & Schwartz, 2021).

The study asked about three different permutations of online learning: temporary remote instruction, fully online courses, and standalone virtual schools (Diliberti & Schwartz, 2021).

Results from after the pandemic began showed that one quarter (25%, $n = 292$) of the districts who engaged with the survey were interested in operating a virtual school as compared with 3% who had run a virtual school before the pandemic. Roughly 36% of surveyed districts planned to offer fully online courses, which reveals a 10% increase from pre-pandemic conditions.

While the growth of pandemic-influenced distance education did not increase dramatically in the 2022 to 2023 school year, overall trends do reveal gradual acceptance and a greater number of choices in district learning options. In March of 2021, “one-third of school principals said that their schools planned to offer remote schooling options to any families that wanted them, even after the pandemic has passed” (Kaufman & Diliberti, 2021, p. 1).

Considerations Regarding the Technology, Education and Copyright Harmonization Act

In recognition of the growth of virtual learning environments, in 2002, Congress passed Section 110(2) of the Copyright Act, which is better known as the Technology, Education and Copyright Harmonization (TEACH) Act (United States Code: Copyright Act, 2002). The main function of the TEACH Act has been to redefine the circumstances and rules under which nonprofit and educational institutions might use copyright-protected materials in a digital format.

Crews (2002) describes the TEACH Act as a positive step in recognizing the need to address copyright laws for distance education and warned that “much of the law is built around permitting uses of copyrighted works in the context of ‘mediated instructional activities’ that are akin in many respects to the conduct of traditional classroom sessions” (p. 3). In other words, the additions made to the law were predicated on minimal changes to the content, course work, type of assessments, and how instructional materials are used, despite the different modality of delivery.

Kehoe (2005) explains the tension that has accompanied the compromises made in the United States Code: Copyright Act (2002) with educators on one side, advocating for expanded user rights for the purpose of distance education, and copyright holders on the other, concerned about a threat to the clear ownership of their intellectual property. The copyright holders have wished to limit the use of their materials in part because “the dissemination and transmission of copyrighted works (as opposed to the mere ‘display’ of such works) poses a substantially greater risk of copyright piracy” (Kehoe, 2005, p. 1038).

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 creator's original work.

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, Griggs (2021) describes "several 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 restrictions" (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 "illustrate each example she described during her lecture, stopping to point out specific features to which she wanted students to pay particular attention" (p. 2205).

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

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 online educator would be forced to secure a license from the copyright owner to integrate the audio clips into her course rather than asking students to purchase and play specific tracks from the CD independently. Licenses for online uses, however, particularly for popular media such as music and movies, can be prohibitively expensive. (p. 2206)

The TEACH Act allows the online *History of Jazz* teacher to display portions of copyrighted works and to perform entire nondramatic literary and musical works and reasonable and limited portions of all other types of works (United States Code: Copyright Act, 2002). As long as the excerpts from the selected music pieces are limited portions, as might be listened to in the f2f class, copyright exemptions apply.

For materials in a distance education course to qualify for use under the TEACH Act, the material must have been "lawfully made and acquired" (United States Code: Copyright Act, 1976, p.25). This means that the resource should be, for example, one for which the district holds a license (which is part of a purchased curriculum) or something that does not have a copyright. It cannot be a copyrighted video that the instructor has downloaded from a website without appropriate permissions.

The other major boundary for distance education is the amount of material that can be legally used. Welkowitz, writing in Gormley's blog, states that the "online exception is more

limited than the one for face-to-face teaching” (Gormley, 2020, para. 5).

The online instructor must make efforts to use as much or as little of a resource in the distance class as they might in a face-to-face environment, and not to simply post large sections of reading or visual materials for the students to study themselves. In making this decision, it is important to understand how the law defines and discerns the difference between a display and a performance.

According to Crews (2003), “displays are generally static images, whether of artwork, text, photographs, or other works; performances generally occur with the playing of music or audiovisual works and the recital of text, poetry, or plays” (p. 38).

Through consideration of these definitions, one gains a sense of the fair use doctrine’s interest in protecting the market value and commercial potential for the copyright holder, while still allowing for excerpts of the work to be used in an educational setting.

The TEACH Act thus permits the full performance of nondramatic literary works (i.e., textbooks, poems, and novels) and full performances of nondramatic musical works (i.e., a specific song or symphony) but restricts plays, movies, or operas and other full performances to reasonable and limited portions (Myers, 2019).

Leadership Recommendations

While the TEACH Act delivers statutory relief for distance educators to use certain copyrighted works in a manner similar to that of their f2f colleagues, the act is also “replete with detailed provisions that tacitly demand the active engagement of many participants inside an educational institution” (Crews, 2003, p. 36).

Considering this imposing list of details, it is also perhaps reassuring to consider, as Hachiya (2022) indicates, that it is not common for school districts to be held liable for copyright infringements made by individual employees. (While not common, it is not completely unheard of. See Hickman [2021] for an example of district liability for an alleged copyright infringement on a social media post.)

It is also worth noting the following regarding the Coronavirus Aid, Relief, and Economic Security (CARES) Act:

The CARES Act authorizes the Register of Copyrights to temporarily adjust statutory deadlines for copyright owners and other affected parties if she determines that a national emergency declared by the President is generally disrupting the normal operation of the copyright system. (U.S. Copyright Office, 2021, para. 3)

Much of the CARES Act relief comes in the form of deadline extensions for the holder of intellectual property and not in that of lifting copyright law to allow distance educators impunity in their use of either analog or digital resources.

School systems still using emergency remote teaching protocols may wish to investigate these accommodations more thoroughly with their legal counsel if there are outstanding concerns.

Engaged and proactive district and school leaders would be wise to consider the policy-based, technological, and instructional demands of the TEACH Act to ensure that they have designed an environment that allows for best use of instructional resources, respects the intellectual property rights of the creators of

these resources and complies with the law.

The following practices, regulations, and policies should be in place for institutions, technology directions and instructors technology directors in educational establishments offering distance education:

- Concerning institutional status, the institution must be a government body or an accredited nonprofit educational institution. Elementary and secondary schools shall be recognized as such by the applicable state certification or licensing procedures.
- The educational institution must have policies regarding copyright. In the case of K12 school systems, this is likely board policy that has been reviewed and approved by the elected school board. The language in the TEACH Act is somewhat lacking in detail, but Crews (2002) suggests that “policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education” (p. 5).
- The institution must “accurately describe, and promote compliance with, the laws of United States relating to copyright” (Crews, 2002, p. 6). These materials must be provided to “faculty, students, and relevant staff members” (p. 6). This means that, in addition to just having a policy, the institution must make additional efforts to communicate expectations about compliance to copyright law, whether in a f2f or distance setting.
- The TEACH Act specifically states that institutions must provide “notice to students that materials used in connection with the course may be subject to copyright protection” (United States Code: Copyright Act, 2002, p.26. This notice could be included in the materials used for the distance education class and not sent as a separate entity. Only enrolled students in a class may use the materials that are placed on the distance learning platform. Therefore, both the institution and the instructor must take care to limit how and by whom the course content is accessed.
- Concerning institutional controls on dissemination and storage, the main concerns here are with how long the material is stored in the institutional system and how the institution might control further dissemination of the materials beyond the students who are legally enrolled in the class. Crews (2002) notes that “both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content” (p. 6). The institution must make some attempt to guard against unauthorized sharing of the materials.
- In considering the length of time that copies are retained, the act addresses how long an institution may retain the materials on its servers, system, or network. The institution must take precautions to protect the materials so that only

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:

- 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 comprised of “reasonable and limited portions” (United States Code: Copyright Act, 2002, p. 25).
- 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).
- 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.

The University of Texas 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 (University of Texas, 2022).

Conclusion

Distance education opens opportunities for institutions to meet the needs of some students and their families. When school closures were common due to public health concerns, the move to distance learning was an important choice made by institutions to support families. Furthermore, research has demonstrated that there is interest in increasing options for this type of learning.

The decision to offer or expand distance education should be one that is made by a collective group of people, including administrators, teachers, and technology personnel, within an institution. Under the requirements of the TEACH Act, individuals in each one of these roles have specific tasks to accomplish. Moreover, the achievement of each of these tasks is

necessary to ensure compliance with the TEACH Act as part of copyright law.

It is crucial for districts to recognize their own responsibilities in protecting both the instructors involved in distance teaching and the intellectual property rights of the creators of materials that can be found online.

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Appendix A

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

- My institution is a nonprofit accredited educational institution or a government 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 the class session.
- I will store the materials on a secure server and transmit them only as permitted by this law.
- I will not make copies other than the one I need to make the transmission.
- The materials are of the proper type and amount that the law authorizes as follows:
 - entire performances of nondramatic literary and musical works,
 - reasonable and limited parts of a dramatic literary, musical, or audiovisual work, or
 - 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, or
 - textbooks, course packs, 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 of the following:
 - I copied only the amount that I am authorized to transmit.
 - There is no digital copy of the work available except one with technological protections that prevent my using it for the class in the way the statute has authorized.

(adapted from <https://guides.lib.utexas.edu/copyright/teachactchecklist>)