

When the Technology, Education and Copyright Harmonization (TEACH) Act was enacted in 2002, librarians hoped that it would provide some clarity on copyright exceptions for the digital delivery of content for distance education. In reality, understanding what is permitted under the TEACH Act in combination with the Digital Millennium Copyright Act (DMCA) and existing exceptions like fair use have become more confusing to many practitioners. As a result, there are many more questions from the field about what is permitted. This piece was written in hopes of clarifying one aspect of the confusion—digital delivery of content to the “physical” classroom. Our thanks to **Jonathan Band** legal counsel to ALA and ARL, **Peter Jaszi**, Professor of Law, Faculty Director of the Glushko-Samuels Intellectual Property Clinic at American University Washington College of Law and **Kenneth D. Crews**, Director of the Copyright Advisory Office at Columbia University for assistance in the drafting of and commenting on this document.

PERFORMANCE OF OR SHOWING FILMS IN THE CLASSROOM

Librarians frequently are asked by teachers at all levels of education – from kindergarten to college – about the permissibility of showing films in the classroom. For once, the Copyright Act actually provides a straightforward answer: the Act contains a specific exception for the performance of works such as films in the classroom. If librarians and instructors take advantage of existing law, they can engage in a range of classroom-based video and film performance activities (e.g., the showing of a film) without having to secure any additional license or permissions.

17 U.S.C. § 110(1) permits “the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction....” It applies to showing of entire films, and also to those that involve less extensive clips from one or several sources.

This provision contains several noteworthy limitations. First, it applies only to face-to-face teaching activities, not distance education. The exceptions that apply to distance education are found in the TEACH Act, 17 U.S.C. § 110(2), and the fair use privilege, 17 U.S.C. § 107.

Second, this exception applies only to the showing of films in physical classrooms or similar places devoted to instruction, and not in remote locations. The key question is where the film will be viewed by the class, not where the physical copy is located. While the exception would cover the streaming of a film from a media lab to the classroom where it is viewed, it would not reach the streaming of a film to students' residences for homework. And while the provision would allow a student to display in class a multimedia presentation including film clips, it would not permit the student to post the presentation to a website. (The permissibility of the posting would be evaluated under the fair use doctrine, 17 U.S.C. § 107.)

Third, the exception does not apply when the instructor knowingly shows an unlawful copy of a film. However, the exception still applies if the instructor reasonably believes that she is showing a fair use copy of a film. Many instructors compile film clips on a VHS tape or a DVD, which they then show to their classes. At a recent hearing before the Copyright Office, representatives of the motion picture industry acknowledged that an instructor's creation of a film clip compilation is a fair use, and that section 110(1) permits the instructor to show this compilation in the classroom.¹

Although the Copyright Act permits the "performance" of films in classrooms, librarians and instructors need to pay attention to contractual restrictions on such performances. When purchasing films from vendors, librarians should make sure that they do not agree to restrictions on classroom uses of the films. If a wholesaler or specialized distributor insists on this restriction, the librarian should purchase the film through a retail outlet that does not impose this restriction when available.

¹ Copying a clip directly from a DVD may require the circumvention of the encryption on the DVD. Section 1201 of the Digital Millennium Copyright Act prohibits the circumvention of technological protection measures, but media studies professors have received an exemption from this prohibition. The Library Copyright Alliance has requested that this exemption be broadened to apply to professors in all disciplines.

On the other hand, librarians and instructors should not be intimidated by statements on a purchased film's packaging or at the beginning of the film itself that the film is for "home use" only. These notices have no legal effect, and do not override the section 110(1) classroom performance exception.² Similarly, librarians should not pay additional costs to acquire a "performance right" if the only expected showings of the film are consistent with Section 110(1). The license to show the film is necessary only for uses beyond those already allowed under the law.

² If the notice is worded as a contract, the situation is more ambiguous. Sometimes the packaging might contain wording such as: "By opening this package, you agree not to make any public performances of this film." Courts disagree on the enforceability of such contracts.