

CPTC Procedure: Copyright Exceptions

Important Note: *This procedure does not apply to instances where Coastal Pines Technical College is already licensed to use a particular work for educational or research purposes.*

The Copyright Law of the United States (Title 17 U.S. Code) includes specific exceptions to copyright that are applicable to academic institutions in the context of education and research. The specific exceptions addressed by this procedure are Fair Use and the TEACH Act.

- The Fair Use exception allows individuals to evaluate a particular use of a copyrighted work according to a set of generally accepted principles and determine whether it is necessary to request copyright permission from the owner of a work for that use.
- The TEACH Act creates provisions for the proper use of literary, musical, and dramatic performances within the context of distance education classes. Compliance with these provisions allows for an exception to copyright.

In order to assist faculty in determining the applicability of the Fair Use or TEACH Act copyright exceptions, Coastal Pines Technical College provides a Fair Use Checklist and a TEACH Act Compliance Checklist, which faculty will use to record decisions regarding the use of copyrighted materials for educational and research purposes. Faculty will maintain a copy of the completed checklist for each work where they determined an exception to copyright.

Primary responsibility for completion of the checklists resides with the faculty who uses the copyrighted work. Faculty may consult a librarian for assistance with either checklist.

Responsibility

The Vice President for Academic Affairs has overall responsibility for ensuring the implementation of this procedure.

Adopted: February 10, 2014

Reviewed: August 9, 2022

Fair Use Checklist

Introduction to the Checklist

The Fair Use Checklist and variations on it have been widely used for many years to help educators, librarians, lawyers, and many other users of copyrighted works determine whether their activities are within the limits of fair use under U.S. copyright law (Section 107 of the U.S. Copyright Act). Fair use is determined by a balanced application of four factors set forth in the statute: (1) the purpose of the use; (2) the nature of the work used; (3) the amount and substantiality of the work used; and (4) the effect of the use upon the potential market for or value of the work used. Those factors form the structure of this checklist. Congress and courts have offered some insights into the specific meaning of the factors, and those interpretations are reflected in the details of this form.

Benefits of the Checklist

A proper use of this checklist should serve two purposes. First, it should help you to focus on factual circumstances that are important in your evaluation of fair use. The meaning and scope of fair use depends on the particular facts of a given situation, and changing one or more facts may alter the analysis. Second, the checklist can provide an important mechanism to document your decision-making process. Maintaining a record of your fair use analysis can be critical for establishing good faith; consider adding to the checklist the current date and notes about your project. Keep completed checklists on file for future reference.

The Checklist as Roadmap

As you use the checklist and apply it to your situations, you are likely to check more than one box in each column and even check boxes across columns. Some checked boxes will favor fair use and others may oppose fair use. A key issue is whether you are acting reasonably in checking any given box, with the ultimate question being whether the cumulative weight of the factors favors or turns you away from fair use. This is not an exercise in simply checking and counting boxes. Instead, you need to consider the relative persuasive strength of the circumstances and if the overall conditions lean most convincingly for or against fair use. Because you are most familiar with your project, you are probably best positioned to evaluate the facts and make the decision.

Name: _____

Institution: _____

Project: _____

Date: _____

Prepared by: _____

Purpose

Favoring Fair Use

- ☐ Teaching (including multiple copies for classroom use)
- ☐ Research
- ☐ Scholarship
- ☐ Nonprofit educational institution
- ☐ Criticism
- ☐ Comment
- ☐ News reporting
- ☐ Transformative or productive use (changes the work for a new utility)
- ☐ Restricted access (to students or other appropriate group)
- ☐ Parody

Opposing Fair Use

- ☐ Commercial activity
- ☐ Profiting from the use
- ☐ Entertainment
- ☐ Bad-faith behavior
- ☐ Denying credit to original author

Nature

Favoring Fair Use

- ☐ Published work
- ☐ Factual or nonfiction based
- ☐ Important to favored educational objectives

Opposing Fair Use

- ☐ Unpublished work
- ☐ Highly creative work (art, music, novels, films, plays)
- ☐ Fiction

Amount

Favoring Fair Use

- ☐ Small quantity
- ☐ Portion used is not central or significant to entire work
- ☐ Amount is appropriate for favored educational purpose

Opposing Fair Use

- ☐ Large portion or whole work is used
- ☐ Portion used is central to or “heart of the work”

Effect

Favoring Fair Use

- ☐ User owns lawfully purchased or acquired copy of original work
- ☐ One or few copies made
- ☐ No significant effect on the market or potential market for copyrighted work
- ☐ No similar product marketed by the copyright holder
- ☐ Lack of licensing mechanism

Opposing Fair Use

- ☐ Could replace sale of copyrighted work
- ☐ Significantly impairs market or potential market for copyrighted work or derivative
- ☐ Reasonably available licensing mechanism for use of the copyrighted work
- ☐ Affordable permission available for using work
- ☐ Numerous copies made
- ☐ You made it accessible on the Web or in another public forum
- ☐ Repeated or long-term use

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TEACH Act Compliance Checklist

Please complete and retain a copy of this form in connection with each copyrighted work considered for your distance education course.

The “Technology, Education, and Copyright Harmonization Act,” better known as the “TEACH Act,” is designed to provide educators more opportunity for the use of copyrighted works in distance education programs while still offering adequate copyright protection to those works. In order to qualify for these further possibilities, educators must meet several requirements. As the responsibilities of the TEACH Act will most likely fall upon different entities within any one educational institution, this checklist should be used as an aid to organize and ensure compliance with the TEACH Act for each copyrighted work. Remember, all requirements must be satisfied in order not to violate the law. For a more detailed explanation of any one requirement, click the “Explanatory Note” following each item. The principal text of the TEACH Act is enacted as Section 110(2) of the U.S. Copyright Act (available at: <http://www.copyright.gov/title17/>).

Keep in mind that if your project does not fit within the conditions of the TEACH Act, you have choices. Your use may be within “fair use” or another copyright exception, or you may secure permission from the copyright owner.

I. TEACH Act requirements that will likely fall within the role of the Instructor:

- ☐ The work transmitted is one of the following:
 - A performance of a nondramatic literary work; or
 - A performance of a nondramatic musical work; or
 - A performance of any other work, including dramatic works and audiovisual works, but only in “reasonable and limited portions”; or
 - A display in an amount comparable to that which is typically displayed in the course of a live classroom session. [[Explanatory Note](#)]
- ☐ The work is not marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity. [[Explanatory Note](#)]
- ☐ The work to be used is not a textbook, course pack, or other material in any media which is typically purchased or acquired by students for their independent use and retention. [[Explanatory Note](#)]
- ☐ The performance or display is:
 - Made by, at the direction of, or under the actual supervision of an instructor “as integral part of a class session offered as a regular part of the systematic, mediate instructional activities” of the educational institution; and
 - Is directly related and of material assistance to the teaching content of the transmission; and
 - Is an integral part of a class session offered as a regular part of the “systematic, mediated instructional activities” of the educational institution. [[Explanatory Note](#)]
- ☐ The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired. [[Explanatory Note](#)]
- ☐ If the work to be used has to be converted from print or another analog version to digital format:
 - The amount of the work converted is no greater than the amount that can lawfully be used for the course; and

- There is no digital version of the work is available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course. [\[Explanatory Note\]](#)

II. TEACH Act requirements that will likely fall within the role of the Institution:

- ☐ The institution for which the work is transmitted is an accredited nonprofit educational institution. [\[Explanatory Note\]](#)
- ☐ The institution has instituted policies regarding copyright. [\[Explanatory Note\]](#)
- ☐ The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws. [\[Explanatory Note\]](#)
- ☐ The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection. [\[Explanatory Note\]](#)
- ☐ The transmission of the content is made “solely for . . . students officially enrolled in the course for which the transmission is made.” [\[Explanatory Note\]](#)

III. TEACH Act requirements that will likely fall within the role of the Information Technology Officials:

- ☐ Technological measures have been taken to reasonably prevent both:
 - Retention of the work in accessible form by students for longer than the class session; and
 - Unauthorized further dissemination of the work in accessible form by such recipients to others. [\[Explanatory Note\]](#)
- ☐ The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works. [\[Explanatory Note\]](#)
- ☐ The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients. [\[Explanatory Note\]](#)
- ☐ The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made. [\[Explanatory Note\]](#)
- ☐ Any copies made for the purpose of transmitting the work are retained and solely used by the institution. [\[Explanatory Note\]](#)

Explanatory Notes

1. Previous law permitted displays of any type of work, but allowed performances of only “nondramatic literary works” and “nondramatic musical works.” Many dramatic works were excluded from distance education, as were performances of audiovisual materials and sound recordings. The law was problematic at best. The TEACH Act expands upon existing law in these several important ways.

2. The prohibition on the use of works that are marketed “primarily for performance or display as part of mediated instructional activities transmitted via digital networks” is clearly intended to protect the market for commercially available educational materials. For example, specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes through “digital” systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize then upload their own copies.

3. One purpose of the law is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace. Not entirely clear is the treatment of other materials that might ordinarily constitute handouts in class or reserves in the library. However, the general provision allowing displays of materials in a quantity similar to that which would be displayed in the live classroom setting (“mediated instructional activity”) would suggest that occasional, brief handouts – perhaps including entire short works – may be permitted in distance education, while reserves and other outside reading may not be proper materials to scan and display under the auspices of this statute.
4. The statute calls for the instructor’s participation in the planning and conduct of the distance education program and the educational experience as transmitted. These requirements share a common objective: to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose.
5. Performances or displays given by means of copies “not lawfully made and acquired” under the U.S. Copyright Act are prohibited if the educational institution “knew or had reason to believe” that they were not lawfully made and acquired.
6. The TEACH Act allows the conversion of materials from analog into digital formats, under the following circumstances: the amount that may be converted is limited to the amount of appropriate works that may be performed or displayed and a digital version of the work is not “available to the institution,” or a digital version is available, but it is secured behind technological protection measures that prevent its availability for performing or displaying in the distance-education program. These requirements generally mean that educators must take two steps before digitizing an analog work. First, they need to confirm that the exact material converted to digital format is within the scope of materials and “portion” limitations permitted under the new law. Second, educators need to check for digital versions of the work available from alternative sources and assess the implications of access restrictions, if any.
7. The benefits of the TEACH Act apply only to a “government body or an accredited nonprofit educational institution.” In the case of post-secondary education, an “accredited” institution is “as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education.” Elementary and secondary schools “shall be as recognized by the applicable state certification or licensing procedures.” Most familiar educational institutions will meet this requirement.
8. The educational institution must “institute policies regarding copyright,” although the language does not detail the content of those policies. The implication from the context of the statute, and from the next requirement about “copyright information,” suggests that the policies would specify the standards educators and others will follow when incorporating copyrighted works into distance education. For most educational institutions, policy development is a complicated process, involving lengthy deliberations and multiple levels of review and approval. Such formal policymaking might be preferable, but informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement.
9. The institution must “provide informational materials” regarding copyright, and in this instance the language specifies that the materials must “accurately describe, and promote compliance with, the laws of United States relating to copyright.” These materials must be provided to “faculty, students, and relevant staff members.”
10. In addition to the general distribution of informational materials, the statute further specifies that the institution must provide “notice to students that materials used in connection with the course may be subject to copyright protection.” While the information materials described in the previous section appear to be more substantive resources detailing various aspects of copyright law, the “notice” to students may be a brief statement simply alerting the reader to copyright implications.

11. The law requires that the transmission be “solely for students officially enrolled in the course for which the transmission is made.” Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions.

12. While the transmission of distance education content may be conducted by diverse technological means, an institution deploying “digital transmissions” must apply technical measures to prevent “retention of the work in accessible form by recipients of the transmission . . . for longer than the class session.” Also, in the case of “digital transmissions,” the institution must apply “technological measures” to prevent recipients of the content from engaging in “unauthorized further dissemination of the work in accessible form.” Both of these restrictions address concerns from copyright owners that students might receive, store, and share the copyrighted content.

13. If the content transmitted through “digital transmissions” includes restrictive codes or other embedded “management systems” to regulate storage or dissemination of the works, the institution may not “engage in conduct that could reasonably be expected to interfere with [such] technological measures.” While the law does not explicitly impose an affirmative duty on educational institutions, each institution may well review any technological systems to assure that systems for delivery of distance education do not interrupt digital rights management code or other technological measures used by copyright owners.

14. The transmission of content must be made “solely for . . . students officially enrolled in the course for which the transmission is made.” In addition, the law also requires that the transmission be “for” only these specific students. Thus, it should not be broadcast for other purposes, such as promoting the college or university, generally edifying the public, or sharing the materials with colleagues at other institutions. The new law also calls upon the institution to limit the transmission to students enrolled in the particular course “to the extent technologically feasible.” Therefore, the institution may need to create a system that permits access only by students registered for that specific class. As a practical matter, the statute may lead educational institutions to implement technological access controls that are linked to enrollment records available from the registrar’s office.

15. The statute explicitly exonerates educational institutions from liability that may result from most “transient or temporary storage of material.” On the other hand, the statute does not allow anyone to maintain the copyrighted content “on the system or network” for availability to the students “for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.”

16. Congress seems to have envisioned distance education as a process within a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law.

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