

TEACH Act and Fair Use

The TEACH Act contains numerous requirements that must be met before it authorizes the transmission of the performance or display of a copyrighted work without permission of the copyright holder.

There will be many instances where the requirements cannot be met for one reason or another. Does this mean the proposed use of the work is prohibited absent permission of the copyright holder?

No. The Senate Report (107-31) accompanying the TEACH Act specifically states:

Nothing in this Act is intended to limit or otherwise to alter the scope of the fair use doctrine. As the Register's Report explains: "Fair use is a critical part of the distance education landscape. Not only instructional performance and displays, but also other education uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances."

Specifically, this legislation is enacted in recognition of the following:

- a. the fair use doctrine is technologically neutral and applies to activities in the digital environment; and
- b. the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable.

Indeed, given the numerous and rigorous requirements of the TEACH Act, fair use will continue to play an essential and pivotal role in facilitating the use of copyrighted materials within distance learning efforts.

If you use the Fair Use checklist and apply it to your situation, 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 concern is whether you are acting reasonably in checking any given box; the ultimate concern is whether the cumulative "weight" of the factors favors or opposes fair use. Because you are most familiar with your project, you are probably best positioned to make that decision.

A second purpose of each checklist is to provide an important means for recording your decision-making process. Maintaining a record of your fair use analysis is critical to establishing your "reasonable and good-faith" attempts to apply fair use to meet your educational objectives. Section 504 (c)(2) of the Copyright Act offers some protection for educators and librarians who act in good faith. Once you have completed your application of fair use to a particular need, keep your completed checklist in your files for future reference.

The TEACH Act or Fair Use?

TEACH Act		
A "no" response to one or more items disqualifies you from using the work under the legal protection of the TEACH Act.		
YES	NO	
<input type="checkbox"/>	<input type="checkbox"/>	I am teaching as part of an accredited non-profit educational institution.
<input type="checkbox"/>	<input type="checkbox"/>	My institution has a stated copyright use policy.
<input type="checkbox"/>	<input type="checkbox"/>	My institution educated relevant students, faculty, and staff on copyright law.
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class is not a commercial educational work.
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class fits under one of the following categories: <ol style="list-style-type: none"> 1. A <u>performance</u> of a non-dramatic literary work. 2. A <u>performance</u> of a non-dramatic musical work. 3. Reasonable and limited portions of any other work (for a <u>performance</u>). 4. The <u>display</u> of any work in amounts analogous to a live classroom setting.
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class was lawfully made/acquired.
<input type="checkbox"/>	<input type="checkbox"/>	The work "I'd like to use in my class is of "material assistance"
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class is part of a "systematic mediated instructional activity".
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class will only be made accessible to my students for the "class session" of which the work is a part.
<input type="checkbox"/>	<input type="checkbox"/>	The work I'd like to use in my class will only be made accessible to students who are formally enrolled in my course.
<input type="checkbox"/>	<input type="checkbox"/>	I have taken reasonable measures to prevent the further retention and dissemination of the work in question.

Adapted from NC State's TEACH Act Checklist.

P
U
R
P
O
S
E

N
A
T
U
R
E

A
M
O
U
N
T

E
F
F
E
C
T

Fair Use	
Favoring	Opposing
<input type="checkbox"/> Directly related to classroom use	<input type="checkbox"/> Commercial activity
<input type="checkbox"/> Research	<input type="checkbox"/> Profiting from use
<input type="checkbox"/> Scholarship	<input type="checkbox"/> Entertainment
<input type="checkbox"/> Nonprofit educational institution	<input type="checkbox"/> Bad-faith behavior
<input type="checkbox"/> Criticism	<input type="checkbox"/> Denying credit to original author
<input type="checkbox"/> Comment	<input type="checkbox"/> Entertainment
<input type="checkbox"/> News reporting	
<input type="checkbox"/> Transformative or Productive Work (changes work for new utility)	
<input type="checkbox"/> Restricted access (to students or other appropriate group)	
<input type="checkbox"/> Parody	
<input type="checkbox"/> Published work	<input type="checkbox"/> Unpublished work
<input type="checkbox"/> Factual or nonfiction based	<input type="checkbox"/> Highly creative work (art, music, novel, film, play)
<input type="checkbox"/> Important to favored educational objectives	<input type="checkbox"/> Fiction
<input type="checkbox"/> Small quantity	<input type="checkbox"/> Large portion or whole work used
<input type="checkbox"/> Portion used is not central or significant to entire work	<input type="checkbox"/> Portion used is central or "heart of the work"
<input type="checkbox"/> Amount is appropriate for favored educational purpose	<input type="checkbox"/>
<input type="checkbox"/> User owns lawfully acquired or purposed copy of original work	<input type="checkbox"/> Could replace sale of copyrighted work
<input type="checkbox"/> One or few copies made	<input type="checkbox"/> Impairs market or potential market for work or derivative
<input type="checkbox"/> Lack of licensing mechanism	<input type="checkbox"/> Available licensing mechanism for use of the copyrighted work
<input type="checkbox"/> No significant effect on the market or potential market for copyrighted work	<input type="checkbox"/> Permission available for using work
	<input type="checkbox"/> Numerous copies made
<input type="checkbox"/> No similar product marketed by the copyright holder	<input type="checkbox"/> You made it accessible on Web or other public forum
	<input type="checkbox"/> Repeated or long-term use

Adapted from NC State's Fair Use Considerations Worksheet and Cornell University's Checklist for Conducting A Fair Use Analysis Before Using Copyrighted Materials

A reasonable fair use analysis is based on four factors set forth in the fair use provision of copyright law, Section 107 of the Copyright Act of 1976. The application of those factors depends on the particular facts of your situation, and changing one or more facts may alter the outcome of the analysis. The checklist derives from those four factors and from the judicial decisions interpreting copyright law.

Understanding the Four Factors of Fair Use

The fair use provision may be applied to the use of all copyrighted works, even those in digital form. To determine whether any particular use is a fair use, you should conduct a case-by-case analysis based on the factors below.

First Factor: Purpose and Character of the Use

Nonprofit, educational, and personal uses are generally favored fair uses while commercial uses are less likely to be deemed fair use. Although educational use in and of itself will not assure that your use is a fair use, by the same token not every commercial use will fail as a fair use. Transformative uses, uses that result in the creation of a new work, with a new purpose and different character are favored as fair uses over uses that merely reproduce an original work. The more transformative a particular use is the less significant the other factors will be as they weigh against fair use.

Second Factor: The Nature of the Copyrighted Work

Factual works, published works and scientific articles that are factual in nature are more likely to be considered available for fair use than are creative, imaginative, artistic, or unpublished works. Additionally certain "consumable" works, e.g. workbooks and standardized tests are not likely to be considered available for fair use.

Third Factor: Amount and Substantiality of the Portion Used

The statute gives no bright line indication concerning how much of a work may be used under fair use but the implication is that use of the whole work is less likely to be considered a fair use. Thus, use of only a small portion of a work is favored. However in some circumstance e.g. uses like research, classroom use, personal use that already weigh in favor of fair use, you may use more of a work. In fact in such cases use of the entire work may be appropriate and allowable as a fair use if using that much is required to accomplish your purpose. A commercial use of the same material in the same amount could weigh heavily against fair use. Amount and substantiality is also a qualitative measure and at times use of even a small portion of a work may be considered too much to qualify as a fair use if that portion used is considered to be the "heart of the work."

Fourth Factor: Effect on the Potential Market for or Value of the Work

Generally, the consideration for this factor is whether or not there is some economic harm to the owner of the copyright as a result of your use. Courts have established the availability of permissions or licenses as one of the potential values for copyrighted works. This factor alone, however, cannot determine whether or not a use is fair. Positioned as the fourth factor it is a bit easier to consider market effects. If the first three factors

weigh in favor of fair use then market harm should carry less weight even when considering the permissions market, since the market is for permissions that are required. Conversely, if the first three factors are tipping the balance in favor of permission then market harm will carry more weight in the balancing of the factors.