

Coast Community College District
ADMINISTRATIVE PROCEDURE Chapter 3
General Institution

AP 3750 USE OF COPYRIGHTED MATERIAL

References:

Education Code Sections 32360 and 67302;
U. S. Code Title 17, Copyright Act of 1976
BP 3750 Use of Copyrighted Material
BP and AP 5500 Student Code of Conduct

Employees and students shall not reproduce copyrighted materials without prior permission of the copyright holder, except as allowed after assessment of right to use the work under the “fair use” doctrine.

Fair Use

“Fair use” is a defense to copyright infringement, codified at 17 U. S. C. §107. “[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” *Golan v. Holder* 132 S. Ct. 873, 890 (2012).

In determining whether the fair use defense applies, courts consider four factors set forth in Section 107. These are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for, or value of, the copyrighted work.

The District’s Office of Risk Services has resources available to provide guidance regarding use of copyrighted materials, and has posted detailed information describing “fair use”, including examples and an assessment tool that should be used to determine whether District personnel’s proposed use of copyright-protected materials qualifies as “fair use.”

Those resources are available at the following link:

<http://www.cccd.edu/employees/riskservices/Pages/copyrightchecklistandreference.aspx>

However, even when using these resources, *it is important to remember*:

- ❖ Each user must assess fair use independently for each use;
- ❖ The resources made available through the Office of Risk Services, including the

assessment tool, do not determine whether the proposed use will in fact be deemed legal by a court should it become the subject of a lawsuit;

- ❖ The assessment tool is not intended as a substitute for legal advice, nor should it be relied on as such;
- ❖ No single statutory factor identified in Section 107 is determinative of “fair use”;
- ❖ While the factors found in Section 107 are important, there may be other relevant considerations, including those set forth in the “guidelines” discussed in the section below entitled “Section 107 and Negotiated Guidelines Relating to Classroom Copying”; and
- ❖ It is always better, if possible, to seek prior permission from the owner of the copyright in the underlying material.

Assuming the work intended to be used was first published *after* 1923, the following will help frame a determination as to whether doing so is “fair use.”¹

Factor 1: What is the purpose and character of the use?

This first factor asks whether the new work merely supersedes the original, or instead adds to or alters the original with a further purpose, character, expression, meaning or message. It asks, is the use “transformative” based on a “reasonable perception of the new work”; does it employ the original in a different manner such that the intended purpose and audience is different for the secondary work than it was for the original. A transformative work deserves greater protection under the “fair use” doctrine.

FACTORS FAVORING FAIR USE	FACTORS DISFAVORING FAIR USE	
Use by a nonprofit organization	Commercial	
Personal use related to one’s education	Profiting from use	
Educational: teaching, research, scholarship	Decorative, nontransformative	
Transformative (serves a new purpose)	Noncritical/noncommentary	
News reporting, commentary	Verbatim copy for no new purpose	
Criticism		
Parody		

Uses on the left tend to tip the balance in favor of “fair use.” Uses on the right tend to tip the balance in favor of the copyright owner.

¹ A proper use of the “fair use” analytical table should serve to focus employees on the factual circumstances most important to a “fair use” evaluation. Changing one or more facts may alter the final analysis. This table also provides important documentation of one’s decision making, and may be critical to establishing “good faith” use. Some factors in the table will favor “fair use,” while others likely will not. A determination should not be based merely on counting and tallying; rather, consider whether the cumulative weight of the circumstances tip in favor or against “fair use.”

Factor 2: What is the nature of the work to be used?

This factor focuses on the value of the materials used. It distinguishes between creative and factual works because, while both are covered by copyright protection, creative works are “closer to the heart of copyright,” and thus tip in favor of the copyright owner under a “fair use” analysis.

FACTORS FAVORING FAIR USE	FACTORS DISFAVORING FAIR USE
Factual works	Creative and artistic works (esp. music)
Nonfiction works	Fictional works
News articles	Consumables such as workbooks, tests
Published works	Unpublished works

Factor 3: The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work; or how much of the work will be used?

This factor asks whether the quantity and quality of the portion used in the secondary work (in relation to the copyrighted work as a whole) is reasonable given the purpose for copying. The larger the volume (or the greater importance) of the original taken, the less likely it will qualify as a “fair use.”²

FACTORS FAVORING FAIR USE	FACTORS DISFAVORING FAIR USE
Proportionally small amount (excerpt/clip)	Entire underlying work
Portion is not “heart” of underlying work	Large portions of underlying work
Portion is insignificant to underlying work	“Heart” of underlying work
Amount used is appropriate based on use	Includes more than is necessary
Only what is absolutely necessary	

² In one case involving the then-unpublished memoir of former President, Gerald Ford, the Supreme Court found that a news magazine’s preemptive copying and publication of 300 words from that memoir did not qualify as “fair use” because it appropriated “the heart” of the original. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985) (portion quoted discussed Ford’s pardon of former President, Richard Nixon, and appeared on newsstands prior to publication of memoir).

Factor 4: Effect on the market for the original

The fourth statutory asks whether the copyright owner will lose any money, or a potential market for her work, in light of the copying. Copyright law is concerned with protecting a copyright holder’s ability to exploit the market for her work, and thus, a secondary use that usurps that market typically will not qualify as “fair use.”

FACTORS FAVORING FAIR USE		FACTORS DISFAVORING FAIR USE	
User owns a lawful copy (lawfully obtained)		Use is a substitute for original	
Single copy or small number of copies		Use = no sale of original	
No impact on market for original		Use usurps licensing opportunity	
No impact on potential market for original		Cumulative effect = substitute for original	
Copyright holder markets nothing similar		Copyright holder markets/licenses same	
Original is out of print or unavailable		Original is readily available	
No available means of reaching © owner		Licensing mechanism exists	
No available means of licensing		Repeated or long term use	
No available means of seeking permission		Numerous copies made/distributed	
One time use		Publicly available; no restrictions	
Spontaneous use (no time)		Easy to redistribute or copy (digital)	
Restricted to limited number of students		Impairs market for the original	
Restricted access		Permission easily sought	
Expands the market for the original			

Given the four statutory factors, do the circumstances and conditions tip in favor or against “fair use”? If one’s assessment is inconclusive, or one is uncertain as to how to conduct this evaluation, s/he should contact the Office of Risk Services.

Reference:

Copyright Act, Section 107

Section 107 and the Negotiated Guidelines Relating to Classroom Copying

The “fair use” doctrine may permit the limited use of copyrighted materials in certain situations, including teaching and scholarship. The importance of such use in the

dissemination of knowledge resulted in the creation of certain "guidelines," negotiated by Congress and the publishing industry in 1976, and set forth in Copyright Office Circular 21. Please note, these guidelines are not codified in law and they may change in the future.

The guidelines provide as follows:

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his/her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book
- B. An article from a periodical or newspaper
- C. A short story, short essay or short poem, whether or not from a collective work
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and
- B. Meets the cumulative effect test as defined below; and
- C. Each copy includes a notice of copyright

Definitions: *Brevity:*

- i. **Poetry:** (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.
- ii. **Prose:** (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words. (Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)
- iii. **Illustration:** One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- iv. **"Special" works:** Certain works in poetry, prose, or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "i" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof may be reproduced.

Spontaneity:

- i. The copying is at the instance and inspiration of the individual teacher; and
- ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

- i. The copying of the material is for only one course in the school in which the copies are made.
- ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- iii. There shall not be more than nine instances of such multiple copying for one course during one class term. (The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.)

III. Prohibitions as to I and II Above:

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations, or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 - a. substitute for the purchase of books, publisher's reprints or periodicals
 - b. be directed by higher authority
 - c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

The foregoing guidelines are *not* intended to usurp the profits of educational publishers. It is not "fair use," for example, to duplicate books and periodicals for use where the copies function as a substitute for the purchase of a book, reprint, periodical, tests workbook, anthology, compilation, or collective work.

Also, these guidelines only apply to books and periodicals; they do not apply to musical or audio visual works for classroom use. Separate guidelines exist with respect to music

(also set forth in Copyright Circular 21), and the use of audio visual works is discussed in 17 U.S.C. §110(1).³

Strict adherence to the above-quoted guidelines, coupled with a reasoned (and reasonable) analysis of the four Section 107 factor will reduce the likelihood of litigation.

References:

Copyright Office Circular 21

Permission from the copyright owner should be obtained when using excerpts of copyrighted work to create anthologies or “course packs,” even if the excerpts fall under the definitions in the “fair use” doctrine.

Online Courses

17 U.S.C. §110(2) applies to online courses, and is generally known as the “Teach Act.” Under this Section 110(2), copyrighted-protected materials may be used only if the following criteria are met:

- The transmitting institution is an accredited, non-profit educational institution;
- The use of the work is part of “mediated instructional activities,” meaning it is “an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting”;
- The use is “directly related and of material assistance to the teaching content of the transmission;”
- The use is made solely for and (to the extent technologically feasible) limited to receipt by students officially enrolled in the course for which the transmission is made;

³ Often referred to as the “classroom use exemption,” Section 110(1) provides that the *performance* or *display* of a work by instructors or students in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, is not an infringement unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made and that the person responsible for the performance knew or had reason to believe was not lawfully made. *Id.*; see also 17 U.S.C. §108, setting forth the rights of reproduction with regards to libraries and archives.

- The transmitting institution institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describes, and promotes compliance with the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection;
- The transmitting institution implements technological measures to prevent retention of the work by its recipients for longer than the class session, and any unauthorized further dissemination of the work;
- The transmitting institution does not take any steps to interfere with the limitations required by the Teach Act;
- The performance of nondramatic literary and musical works, and the “reasonable and limited portions of other work[s]” is no greater than that “which is typically displayed in the course of a live classroom session”;
- The works used do not include textbooks, course packs, or other materials typically purchased or acquired by students for their independent use and retention, including commercial works that are sold or licensed for the purposes of digital distance education; and
- The transmitting institution does not know or have reason to believe that any copyright-protected materials performed or displayed as part of the course was unlawfully made or acquired.

References:

The TEACH (Technology, Education and Copyright Harmonization) Act;
 U.S. Code 17, Copyright Act, Sections 110(2) and 112

Consequences and Sanctions

The District holds employees and students accountable to adhere to the usage of copyrighted materials rules. Employees are encouraged to consult with the Office of Risk Services, should they need further guidance related to this matter. Unauthorized usage of copyrighted materials, including unauthorized peer-to-peer file sharing, downloads or distribution of copyrighted materials may result in disciplinary actions and lead to civil, criminal, and monetary liabilities.

Students are encouraged to review BP and AP 5500, Student Code of Conduct, as it relates to this matter.

The best way to insure that use of a protected work complies with the Copyright Act is to seek permission from the copyright owner. Such permission is always required when creating anthologies or “course packs,” even if one reasonably believes the excerpts qualify as “fair use.”

References:

Basic Books, Inc. v. Kinko's Graphics Corp. (S.D.N.Y. 1991) 758 F.Supp. 1522;
and Princeton University Press v. Michigan Document Services, Inc. (6th Cir.
1996) F.3d 1381
34 C.F.R § 668.43(a)(10), Consumer Information Requirements

Additional Resources for Guidance

1. *The Association of American Publishers, www.publishers.org, click on “conferences and publications.”*
2. *National Association of College Stores, www.nacs.org, click on “industry information”*
Software and Information Industry Association, www.siiia.net, click on “bookstore.”
3. *Copyright Clearance Center, www.copyright.com*
4. *American Libraries Association, www.ala.org, click on “Washington Office” or “issues and advocacy.”*

Ratified December 2, 2013
Ratified April 6, 2016