

## FAIR USE CHECKLIST

### 17 U.S.C. §107

This 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. 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.

These factors form the structure of this checklist. Congress and courts have offered some insights into the specific meaning of the factors, and these interpretations are reflected in the details of this form.

#### **Benefits**

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

#### **A Roadmap**

As you use the 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 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 the fair use. This is not an exercise in simply checking and counting boxes. Instead, consider the relative persuasive strength of the circumstances and if the overall conditions lean most convincingly for or against fair use.

# FAIR USE CHECKLIST

Instructor \_\_\_\_\_

Date \_\_\_\_\_

*Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project.*

## Favoring fair use

## Opposing fair use

### PURPOSE

- Teaching
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Transformative or productive use (enhances, yet preserves original work)
- Restricted access (available only to students or another appropriate group)
- Parody

- Commercial activity (will it be sold?)
- Profiting from the use
- Entertainment
- Bad-faith behavior (ignoring copyright law)
- Denying credit to original author (lack of credit or no attribution given)

### NATURE

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

- Unpublished work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

### AMOUNT

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

- Large portion or entire work to be used
- Portion to be used is central to or "heart of the work"

### EFFECT

- 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 (item not currently packaged the way you intend to use it)
- Lack of licensing mechanism

- 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 license fee available for using work
- Numerous copies made
- Made openly accessible on the internet or in another public forum
- Repeated or long-term use desired