

CHECKLIST FOR FAIR USE ANALYSIS

This checklist is a tool to assist you as you apply the fair use balancing test to specific situations in which you want to use copyrighted materials. If a particular use is fair use, it may proceed without authorization from the copyright owner; if the use does not fall within fair use, permission is necessary.

The fair use analysis is always circumstantial and never entirely certain. For each of the four fair use factors below, determine whether each listed circumstance favors or disfavors fair use based on the specific material in question and the use desired. Where the circumstances favoring fair use outnumber those against it, you can feel comfortable in relying on the fair use exception. Where less than half the circumstances favor fair use, you should seek permission or consider alternatives to using the work as planned.

FACTOR ONE – PURPOSE OF THE USE

Favoring Fair Use

- Educational
 - Teaching (including multiple copies for classroom use)
 - Research
 - Scholarship
 - Criticism
 - Comment
- Transformative or Productive use (Changes the work to serve a new purpose)
- Nonprofit use.

Disfavoring Fair Use

- Commercial, entertainment or other use.
- Verbatim or exact copy, not transformative.
- Profit generating use.

FACTOR TWO – NATURE OF THE COPYRIGHTED MATERIAL

Favoring Fair Use

- Factual, nonfiction, news
- Published work

Disfavoring Fair Use

- Creative or consumable work. (art, music, feature film, fiction; workbook, case study or test)
 - Unpublished work
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FACTOR THREE – AMOUNT COPIEDFavoring Fair Use

- Small quantity used (e.g. single chapter or journal article, other short excerpt (less than 10-15% of the whole work)).
- Portion used is not central to work as a whole.
- Amount is appropriate to the educational purpose.

Disfavoring Fair Use

- Large portion or entire work.
- Portion used is central or the “heart” of the work.
- Includes more than necessary for educational purpose.

FACTOR FOUR -- EFFECT ON THE MARKET FOR THE ORIGINALFavoring Fair Use

- No significant effect on the market or potential market for the copyrighted work.
- One or few copies made and/or distributed.
- No longer in print; absence of licensing mechanism.
- Restricted access (limited to students in a class or other appropriate group).
- One-time, spontaneous use (no time to obtain permission).

Disfavoring Fair Use

- Cumulative effect of copying would be to substitute for purchase of work.
- Numerous copies are made and/or distributed.
- Reasonably available licensing mechanism for obtaining permission exists (CCC license or off-prints for sale)
- Copy will be available on the Web or otherwise broadly distributed.
- Repeated or long-term use.