Fair Use Checklist  Adapted under a “Creative Commons Attribution Only” license. Attribution: Kenneth D. Crews, Columbia University and Dwayne K. Buttler, University of Louisville

Fair Use is identified in 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.

Use this checklist to guide and document your decision-making. You may find that you check more than one box in each column and even check boxes across columns. Consider each factor and evaluate whether the cumulative weight of your analysis favors or turns you away from fair use and towards seeking permission to use a copyrighted work.

I Purpose of the use
The fair use statute lists several purposes appropriate for fair use, such as criticism, comment, news reporting, teaching, scholarship, or research. These activities are also common and important at the university. But be careful: Not all nonprofit educational uses are “fair.” A finding of fair use depends on an application of all four factors, not merely the purpose. However, limiting your purpose to some of these activities will be an important part of claiming fair use. Courts also favor uses that are “transformative,” or that are not merely reproductions. Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility, such as pieces of work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original.

Favoring Fair Use:
☐ Teaching (including multiple copies for classroom use)
☐ Research
☐ Scholarship
☐ Nonprofit educational institution
☐ Criticism
☐ Comment
☐ News reporting
☐ Parody
☐ Transformative (creation of a new work, new purpose)
☐ Restricted access (to students or other group)

Opposing Fair Use
☐ Commercial activity
☐ Profiting from use
☐ Entertainment or non-critical use
☐ Bad-faith behavior
☐ Denying credit to original author

II Nature of the work used
This factor centers on the work being used, and the law allows for a wider or narrower scope of fair use, depending on the characteristics of the work. For example, the unpublished “nature” of a work, such as private correspondence or a manuscript, can weigh against a finding of a fair use. The courts reason that copyright owners should have the right to determine the circumstances of “first publication.” Use of a work that is commercially available specifically for the education market is generally disfavored and is unlikely to be considered a fair use. Additionally courts tend to give greater protection to creative works; consequently, fair use applies more broadly to nonfiction, rather than fiction. Courts are usually more protective of art, music, poetry, feature films, and other creative works than they might be of nonfiction works.

Favoring Fair Use
☐ Published work
☐ Factual or nonfiction based
☐ Important to favored educational objectives

Opposing Fair Use
☐ Unpublished work
☐ Highly creative source (art, music, fiction)
Amount and substantiality of the work used

Although the law does not set exact quantity limits, the more you use, the less likely you are within fair use. The “amount” used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. Sometimes the exact “original” is not always obvious. A book chapter might be a small portion of the book, but the same content might be published elsewhere as an article or essay and be considered the entire work in that context. The “substantiality” of the work used is another key factor. Courts have ruled that even uses of small amounts may be excessive if they take the “heart of the work.” For example, a short clip from a motion picture may usually be acceptable, but not if it encompasses the most extraordinary or creative elements of the film. Photographs and artwork often generate controversies, because a user usually needs the full image, or the full amount and this may not be a fair use. On the other hand, a court has ruled that a “thumbnail” or low resolution version of an image is a lesser “amount” which may be a way to serve educational purposes.

Favoring Fair Use
- Small quantity proportionate to the entire work
- Portion used is not central or significant to entire work
- Amount is appropriate for educational or other purpose

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

Effect of the use on the potential market for or value of work used

Effect on the market is perhaps more complicated than the other three factors. Fundamentally, this factor means that if you could have realistically purchased or licensed the copyrighted work, that fact weights against a finding of fair use. To evaluate this factor, you may need to make a simple investigation of the market to determine if the work is reasonably available for purchase or licensing. A work may be reasonably available if you are using a large portion of a book that is for sale at a typical market price. “Effect” is also closely linked to “purpose.” If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then adverse market effect may be easier to prove. Occasional quotations or photocopies may have no adverse market effects, but reproductions of entire software works and videos can affect the potential markets for those works.

Favoring Fair Use
- Lawfully purchased/acquired copy of original work
- One or few copies made
- No significant effect on the market
- 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 copyrighted work
- Affordable permission available for using work
- Numerous copies made
- Made accessible on the Web or in other public forum
- Repeated or long-term use

Fair Use is a Balancing Test

Always keep in mind that you need to apply all four factors. Do not jump to a conclusion based simply on whether your use is educational or commercial. You still need to evaluate, apply, and weigh in the balance the nature of the copyrighted work.

This flexible approach to fair use is critical in order for the law to adapt to changing technologies and to meet innovative needs of higher education.

Not all factors need to weigh either for or against fair use, but overall the factors usually lean one direction or the other. Your analysis should guide you to a conclusion.