

## FAIR USE ANALYSIS TOOL

**What is fair use?** While copyright law restricts the use of copyrighted materials without the copyright holder's permission, the doctrine of fair use is available under certain circumstances as a defense to using copyrighted works without permission. As a threshold issue, section 107 of the Copyright Act provides that a fair use analysis may be applied where copyrighted works are used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." The copyright law then lists the following four factors that must be considered in determining whether a particular use falls under the "fair use" defense:

- (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 upon the potential market for, or value of, the copyrighted work.

Because the four factors as codified into law are broad, the most useful guidance on these factors is gleaned from court decisions ruling on whether challenged uses of copyrighted works are protected under the fair use defense. *\*From time to time, the Office of the General Counsel will post on its website examples of the types of use that generally fall under fair use.*

**Your responsibility:** The applicability of the fair use factors depends on the particular facts of your proposed use. Because you are most familiar with your proposed use, you are in the best position to determine whether your proposed use of copyrighted material is likely to be permitted under the fair use defense. This tool has been developed to assist you in applying the four factors to your proposed use so that you can appropriately assess whether your proposed use of a copyrighted work can be covered by fair use.

To comply with University policy, you are required to complete and retain a copy of this form in connection with each "fair use" determination of a copyrighted work to document that your decision-making process for using the proposed work comports with the law. Please use the "Notes" section to add more contextual information regarding your assessment of the factors in connection with your intended use.

Name:

Date:

Course/Project:

Description of Copyrighted Material (title, author, date of copyright):

Amount of Proposed Use: (e.g., number of pages, chapters, lines, or duration) vs. whole work:

### 1. Purpose and Character of Your Use

**Rule:** While the copyright law distinguishes between commercial and nonprofit educational purposes, this distinction is not dispositive of fair use. In enacting the law, Congress specifically

rejected an exemption that would protect all use for educational purposes. More significant to your assessment is whether your intended use of a copyrighted work merely duplicates the work or whether it will alter or transform the original work in such a way as to create something new. Where the intended use is educational and transformative, your use is more likely to fall under fair use. Even if your use is arguably commercial, your use may still qualify as fair use if it is highly transformative. Where your use merely duplicates an original work, it is quite likely that your use will not fall under fair use, even if your use is for nonprofit educational purposes.

#### *Application*

- Is the purpose of your intended use different than that of the original work?
- Does your proposed use transform the original work by adding something new, presenting it in a different medium and context, or altering the original work by creating new expression, insights or meaning?

#### *Your assessment*

Describe details regarding purpose and character of the proposed use:

## **2. Nature of the Copyrighted Work**

**Rule:** This factor is straightforward, but as with the other factors, not dispositive. Courts have considered use of works that are factual or published as weighing in favor of fair use, and use of works that are creative or unpublished as weighing against fair use.

#### *Application*

- Is the work that you wish to use a factual work or are you seeking to use a highly creative work, such as a poem, play, photograph or novel?
- Is the work that you seek to use already published?

#### *Your assessment*

Describe details regarding “nature” of the proposed use:

### **3. Amount and Substantiality of the Portion to be Used**

**Rule:** There is no bright line rule here and your analysis of this factor will be particular to the facts. In general, the smaller the portion of a work used, the more likely the use will be considered fair. However, if you use a portion considered to be the "heart of the work," even if that portion constitutes a very small percentage of the entire work, your use will less likely qualify as a fair use. Moreover, the extent of permissible use may vary depending on the purpose and character of the use (See Factor 1 above). Thus, even if your use is arguably substantial, provided your use is the amount required to accomplish your specific purpose and/or is highly transformative, your use may be fair. For example, at least one court has determined that the use of a copyrighted photograph in its entirety was fair use, where the use was transformative and the photograph was reproduced only as a thumbnail with less clarity than the original image.

#### *Application*

- Is only a short clip or excerpt to be used?
- Is the portion to be used the "heart of the work"?
- Is the amount to be used only that of which is required to accomplish your purpose?

#### *Your assessment*

Describe details regarding amount and substantiality of the portion to be used:

### **4. Effect on the Market for the Original Work**

**Rule:** This factor is typically given great weight by courts, and, as a practical matter, is the factor most likely to trigger a challenge to use claimed to be fair. Consider whether your use deprives the copyright owner of income or whether it undermines a potential market for the copyrighted work. Some courts have found that restricting access to the reproduced content to prevent copying by others diminishes the potential negative effect on the market for the original work. Another court has found that where the use stimulates the market for the original work, such use will actually have a positive impact on the market. Note that your consideration of this factor may turn on previously considered factors, such as the amount and substantiality of the portion used. For example, the more of the material you intend to use, the greater the negative impact on the market for the work and the less likely your intended use will be considered fair. If you intend to use the material on an ongoing basis, such repeated use may not be a defensible fair use, but this will depend on individual circumstances.

### *Application*

- Is the material (e.g., a digital image, an excerpt from a book) already available for a price? Is the price a fair market price? Is the contemplated use one which permission from the copyright holder is generally required?
- Is a licensing or other payment mechanism in place for the contemplated use? If not, based on current indicators, how likely will such a mechanism be put in place?

### *Your assessment*

Describe details regarding effect of the contemplated use on the market or any potential market:

## **5. Final Determination**

Your final determination requires a subjective balancing of each of the four factors. You may find that some factors are more significant than others under the particular circumstances or that certain factors impact others. If you determine that the fair use defense applies to your intended use, briefly explain how you have arrived at this conclusion in the box below. Please note that the University appreciates that fair use assessment is not an exact science and requires only that you make a good faith determination.

Describe details regarding your final determination:

If you determine that your intended use does not constitute fair use, then permission of the copyright holder is required to use the work. Keep in mind, however, that you do have alternatives. You might reevaluate your proposed use and/or consider using a smaller portion of the material, paraphrasing the material, or limiting access to the material to adjust the fair use analysis outcome. If your use requires displaying performances of copyrighted works online for distance learning purposes, your contemplated use may be permissible under the TEACH Act, which provides copyright exemptions independent of fair use. Please consult the University's Guidelines for the TEACH Act for guidance on invoking the TEACH Act.