

## FAIR USE ANALYSIS WORKSHEET

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(online version available at: <http://www.lib.umn.edu/copyright/checklist.phtml>)

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\* See Reverse Side for more detail. Complete and retain this form for your files.

### PURPOSE

Favor Fair Use

- Instruction, course websites – access restricted to registered students
- Scholarly research, personal use, study
- Student use to complete assignment
- Transformative use, creates a new work with a new purpose
- Statutory uses, criticism, comment, new reporting

Weigh Against Fair Use

- Commercial Activity
- No attribution to original authors
- Profiting from use
- For publication
- For public distribution

### NATURE

Favor Fair Use

- Published Work
- Factual Work
- Non-fiction

Weigh Against Fair Use

- Unpublished Work
- Creative, imaginative, artistic work
- Consumable work, once used is unusable by others

### AMOUNT

Favor Fair Use

- Small excerpt, extract, or clip
- Only portion needed for favored educational purpose

Weigh Against Fair Use

- Entire work
- Portion used is “heart of the work”

### MARKET EFFECT

Favors Fair Use

- One or few copies made
- Use stimulates market for original work
- No impact on market for original work
- No licensing mechanism in place

Weighs Against Fair Use

- Impairs market for original work
- Repeated use, when market exists for work
- Licensing mechanism for use is available
- Multiple copies, not for educational purpose

## Section 107 - Limitations on Exclusive Rights: Fair Use

### Section 107 Fair Use

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-*

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

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#### First Factor

*Purpose and Character of the use:* Nonprofit, educational, and personal uses are generally favored fair uses while commercial uses are less likely to be deemed fair use. Although educational use in and of itself will not assure that your use is a fair use, by the same token not every commercial use will fail as a fair use. Transformative uses, uses that result in the creation of a new work, with a new purpose and different character are favored as fair uses over uses that merely reproduce an original work. The more transformative a particular use is the less significant the other factors will be as they weigh against fair use.

#### Second Factor

*The nature of the copyrighted work:* Factual works, published works and scientific articles that are factual in nature are more likely to be considered available for fair use than are creative, imaginative, artistic, or unpublished works. Additionally certain “consumable” works, e.g. workbooks and standardized tests are not likely to be considered available for fair use.

#### Third Factor

*Amount and substantiality of the portion used;* The statute gives no bright line indication concerning how much of a work may be used under fair use but the implication is that use of the whole work is less likely to be considered a fair use. Thus, use of only a small portion of a work is favored. However in some circumstance e.g. uses like research, classroom use, personal use that already weigh in favor of fair use, you may use more of a work. In fact in such cases use of the entire work may be appropriate and allowable as a fair use if using that much is required to accomplish your purpose. A commercial use of the same material in the same amount could weigh heavily against fair use.

Amount and substantiality is also a qualitative measure and at times use of even a small portion of a work may be considered too much to qualify as a fair use if that portion used is considered to be the “heart of the work”.

#### Fourth Factor

*Effect on the potential market for or value of the work:* Generally the consideration for this factor is whether or not there is some economic harm to the owner of the copyright as a result of your use. Courts have established the availability of permissions or licenses as one of the potential values for copyrighted works. This factor alone, however, cannot determine whether or not a use is fair. Positioned as the fourth factor it is a bit easier to consider market effects. If the first three factors weigh in favor of fair use then market harm should carry less weight even when considering the permissions market, since the market is for permissions that are required. Conversely, if the first three factors are tipping the balance in favor of permission then market harm will carry more weight in the balancing of the factors.