

Copyright Compliance: Understanding the Doctrine of Fair Use

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RESEARCH MATTERS **LIVE**



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What is Copyright?

- Article I, Section 8, Clause 8 – “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”
- The Copyright Act of 1976
 - Copyright attaches automatically to an idea that has been expressed and fixed in some sort of tangible medium.
 - The expression has to be original. To be considered original, there must be a modicum of creativity in how it has been expressed.
 - The Copyright Act establishes in the rights holder(s) a series of exclusive rights, but also provides for a number of exceptions to those rights.



Using Resources Subject to Copyright

- Did you create it?
- Is it protected by copyright?
 - Is it in the public domain?
 - Was it created by the federal government?
- Is a license to use the resource available?
 - Purchasing a license
 - Creative Commons licenses
- Does the TEACH Act apply?
- Does the Doctrine of Fair Use apply?



The Doctrine of Fair Use

- One may make fair use of a copyrighted work without the copyright holder's permission.
- The determination of whether a use of a copyrighted work is within fair use depends upon making a reasoned and balanced application of the four fair use factors set forth in Section 107 of the U.S. Copyright Act. Those factors are:
 - the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - the **nature of the copyrighted work**;
 - the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
 - the **effect of the use upon the potential market** for or value of the copyrighted work.



Using the Fair Use Checklist

- The USG provides a Fair Use Checklist for use by University System employees to aid in determining whether a potential use of copyrighted material constitutes a fair use.
- The checklist is available on the USG website:
[https://www.usg.edu/copyright/fair use checklist](https://www.usg.edu/copyright/fair_use_checklist)
- The Checklist consists of four sections, corresponding to the four factors we discussed previously.
- Using the checklist is important for two main reasons:
 1. It helps you to make your own reasoned determination of whether or not a use is likely fair use, and
 2. If the use turns out not to be fair use, it helps to establish a reasonable good faith defense to the infringing use.



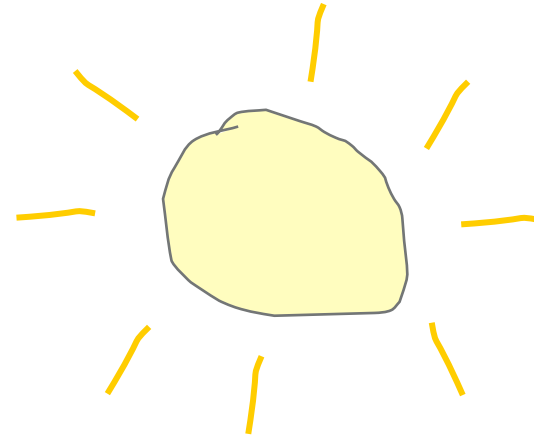
Using the Fair Use Checklist - Example

Let's apply part of the Checklist to the following scenario as an example.

Mr. C is designing a presentation to give to a distinguished group of faculty at a Tier I Research Institution somewhere in the southeastern United States. The topic of the presentation is fair use, and Mr. C wants to use a series of examples in the presentation, but he is concerned about whether or not he has the necessary rights to use each of the examples in his presentation. Help him think through whether he can use the materials on the following slides in his presentation.



Using the Fair Use Checklist - Example



OK to use? Why
or why not?



Using the Fair Use Checklist - Example



BY

Attribution

Others can copy, distribute, display, perform and remix your work if they credit your name as requested by you



ND

No Derivative Works

Others can only copy, distribute, display or perform verbatim copies of your work



SA

Share Alike

Others can distribute your work only under a license identical to the one you have chosen for your work



NC

Non-Commercial

Others can copy, distribute, display, perform or remix your work but for non-commercial purposes only.



OK to
use?
Why or
why not?

"How to License Poster" by Creative Commons is licensed under CC BY 4.0

Using the Fair Use Checklist - Example



A photograph (original on bottom and altered on top) of Nikita Khrushchev at the UN General Assembly, October 12, 1960, probably in the midst of extolling the virtues of the U.S. Copyright Act's permissive doctrine of fair use.

OK to
use?
Why or
why not?



Using The Fair Use Checklist – Example

Factor 1: Purpose and Character of Use

Weights in Favor of Fair Use	Weights Against Fair Use
<input type="checkbox"/> The use is for the purpose of teaching in a non-profit educational institution (including multiple copies for classroom use).	<input type="checkbox"/> The use is for a commercial purpose.
<input type="checkbox"/> The use is for criticism, comment, news reporting, or parody or transforms the presentation or use.	<input type="checkbox"/> Mirror image copying without the addition of criticism, comment, news reporting or parody or transformation of presentation or use.
<input type="checkbox"/> The use is necessary to achieve an intended educational purpose.	<input type="checkbox"/> The use is not necessary to achieve an intended educational purpose.
<input type="checkbox"/> Distribution is limited by password to students within a class for the term of the course; student may download, print, or save the materials for own use, but not further distribute; student acknowledges copyrighted nature of the materials.	<input type="checkbox"/> Unlimited or uncontrolled distribution.



Using The Fair Use Checklist – Example

Factor 2: Nature of the Work

Give this factor less weight when the work is published, non-consumable, and non-fictional.

Weighs in Favor of Fair Use	Weighs Against Fair Use
<input type="checkbox"/> The work is non-fictional in nature.	<input type="checkbox"/> The work is fictional or highly creative (art, music, novel, film, play, poetry).
<input type="checkbox"/> The work is non-fictional in nature, and author opinion, subjective description and evaluative expression do not dominate the work.	<input type="checkbox"/> The work is non-fictional in nature and, author opinion, subjective description and evaluative expression dominate the work.
<input type="checkbox"/> The work is a “non-consumable” work (e.g., standard book or similar publication).	<input type="checkbox"/> The work is a consumable work (e.g., workbook or test).
<input type="checkbox"/> The original work has been published.	<input type="checkbox"/> The original work has never been Published.



Using The Fair Use Checklist – Example

Factor 3: Amount and Substantiality of Portion Used

There is no bright line rule regarding the amount of use that will be deemed fair—amounts less than 10% have been deemed unfair whereas amounts more than 10% have been deemed fair based on the other factors. You should avoid using a portion that is the “heart of the work.”

Weighs in Favor of Fair Use	Weighs Against Fair Use
<input type="checkbox"/> A decidedly small amount such as one chapter or less of the work is used.	<input type="checkbox"/> Multiple chapters of the work are used.
<input type="checkbox"/> Amount used is narrowly tailored to accomplish a legitimate purpose in the course curriculum.	<input type="checkbox"/> Amount used is more than necessary to accomplish a legitimate purpose in the course curriculum.
<input type="checkbox"/> A small number of chapters of the work are used, and you have concluded that both the “effect on the market” and the “purpose and character of the use” favor fair use.	<input type="checkbox"/> Multiple chapters of the work are used, and you have not concluded that both the “effect on the market” and the “purpose and character of the use” favor fair use.



Using The Fair Use Checklist – Example

Factor 4: Effect on Market for Original

Please note that you must own a lawfully acquired or purchased copy of the original work that is used. This factor carries the most weight, but it is not so weighty that it determines the outcome of the fair use analysis. Favorable fair use results with respect to the above three factors (including a neutral finding regarding nature of the work) may outweigh unfavorable results here.

Weights in Favor of Fair Use	Weights Against Fair Use
<input type="checkbox"/> The work as a whole is currently available for purchase, and a conveniently and efficiently accessible and reasonably priced digital license is not available.	<input type="checkbox"/> The work as a whole is currently available for purchase, and a conveniently and efficiently accessible and reasonably priced digital license is available.
<input type="checkbox"/> The work as a whole is not available for purchase, and a digital license is not available.	<input type="checkbox"/> The work as a whole is not available for purchase, and a digital license is available.



The Fair Use Checklist - Caveat

All four factors should be evaluated in each case, and no one factor will determine the outcome. While fair use is intended to apply to teaching, research, and other such activities, an educational purpose alone does not make a use fair. The “purpose and character of the use” is only one of four factors that users must analyze in order to conclude whether or not the use is fair, and therefore lawful. Moreover, each of the factors is subject to interpretation as courts work to apply the law.



Questions?

