

Copyright and Fair Use at Occidental College

Information Resources is making the following information and fair use checklist available to the Occidental College academic community. The intent is to help faculty, librarians, students, staff and others involved in the use of copyrighted works to focus on the factual circumstances in the evaluation of a claim of fair use.

The first step in your analysis is to determine whether or not the material is protected by copyright. If not, you do not need to do a fair use analysis. Three classifications are a general guide to this determination. If you need assistance, please contact the library. The general guides are: (1) works created by U.S. government employees as part of their official duties are not protected by copyright; (2) works first published prior to 1923 are no longer protected by copyright; (3) all materials first published after 1978 should be presumed to be protected by copyright, even if no copyright notice is present.

If Occidental College holds a license for the material that you want to use and if the license provisions cover your use of the material, you do not need to do a fair use analysis. The library or ITS staff will be able to help you to locate this information if you need it.

Finally, the copyright law includes a separate exception that specifically allows for performance or display (but not copying and distribution) of a work by instructors or students in the course of “face-to-face” teaching activities. [17 U.S.C. § 110(1)]. If your proposed use falls into this statutory exception, you need not conduct a fair use analysis.

If none of these situations applies to your intended use of copyrighted material and you want to assert a claim of fair use, you need to do an analysis of your particular situation within a framework based on the four factors set forth in the fair use provision of copyright law, Section 107 of the Copyright Act of 1976. (A copy of the entire Act can be found at <http://www.copyright.gov/title17/>).

To apply the four-factor analysis, use the checklist below while considering the particular facts of your situation that include the use of copyrighted material. A change in one or more factors may alter the outcome of your analysis. Librarians, legal counsel and information resource professionals at a number of colleges and universities developed the checklist across the country. It is based on the four factors in the Copyright Act and on judicial decisions that have been rendered about copyrighted works.

The second reason for using the checklist is to provide documentation of the reasoning process that you used in obtaining your decision that the use of the copyrighted material qualified under the fair use provision. By completing and recording your fair

use analysis and outcome, you can show “reasonable and good-faith” efforts to apply the fair use provisions to meet your educational goals. The Copyright Act provides educators and librarians who act in good faith as they analyze their use of copyrighted materials with some protection. This protection is described in Section 504 (c)(2) of the Copyright Act. Please keep a copy of your completed checklist for each analysis of fair use.

When you use the checklist, you may find that you are checking boxes in each column and across columns. Some checks will indicate a more favorable indication of appropriate fair use while others will indicate that fair use may not be appropriate in the particular situation. Please approach the task of checking one box over another in a thoughtful and reasonable manner. Ultimately, you will need to ascertain if the cumulative “weight” of the factors favors or opposes a claim of fair use. Since you are most familiar with the materials you want to use and the educational goals that you want to achieve through the use of those materials, you are most likely better positioned to make the fair use determination.

Finally, please remember that your use of copyrighted materials in all situations should include proper copyright notice and attribution.

Fair Use Checklist

Name:

Date:

Class or Project:

Course and Term:

Title of Copyrighted Work:

Author (Artist, Performer, etc.) and Publisher:

Portion(s) to be used (e.g., pages, timer counts):

Instructions: In doing a fair use analysis using the four-factors, you can presume that when the factors favoring fair use exceed the number of factors that oppose fair use, your reliance on fair use for the materials in that particular situation is justified. If less than half of the factors favor a claim of fair use, you should seek permission from the rights holder. When the factors are split evenly, you should carefully consider all of the factors that you have checked for a particular use to determine if you believe the use is justified. Not all factors may be present in any particular use and no single factor is determinative of fair use. If you have questions about your analysis of fair use, please contact Occidental's General Counsel.

For each "fair use" of a copyrighted work, you should complete and keep a copy of this checklist. Should any dispute arise, this checklist may be used to establish your "reasonable and good faith" attempt to apply the fair use provision for copyrighted work.

Factor 1: Purpose and Character of the Use

| <i>Check</i> | <i>Weighs in Favor of Fair Use</i> | <i>Check</i> | <i>Weighs Against Fair Use</i> |
|--------------|---|--------------|--|
| | Teaching (including multiple copies for classroom use) | | Profiting from use |
| | Nonprofit Educational | | Commercial activity |
| | Research or Scholarship | | Non-transformative |
| | Criticism, Comment, News Reporting, or Parody | | For publication |
| | Transformative (use changes work for new utility or purpose) | | For public distribution |
| | Use is necessary to achieve your intended educational purpose | | Use exceeds that which is necessary to achieve your intended educational purpose |
| | Personal Study | | |
| | <i>Factor Weighs in Favor of Fair Use</i> | | <i>Factor Weighs Against Fair Use</i> |

Factor 2: Nature of Copyrighted Work

| <i>Check</i> | <i>Weighs in Favor of Fair Use</i> | <i>Check</i> | <i>Weighs Against Fair Use</i> |
|--------------|---|--------------|--|
| | Published Work | | Unpublished work |
| | Factual or non-fiction work | | Highly creative work (art, music, novels, films, plays, poetry, fiction) |
| | Important to educational objectives | | Consumable work (workbook, test) |
| | <i>Factor Weighs in Favor of Fair Use</i> | | <i>Factor Weighs Against Fair Use</i> |

Factor 3: Amount and Substantiality of Portion Used

| <i>Check</i> | <i>Weighs in Favor of Fair Use</i> | <i>Check</i> | <i>Weighs Against Fair Use</i> |
|--------------|---|--------------|---|
| | Small portion of work used | | Large portion or entire work used |
| | Portion used is not central or significant to entire work as a whole | | Portion used is central to work or “heart of the work” |
| | Amount taken is narrowly tailored to educational purpose, such as criticism, comment, research, or subject being taught | | Amount taken is more than necessary for criticism, comment, research, or subject being taught |
| | <i>Factor Weighs in Favor of Fair Use</i> | | <i>Factor Weighs Against Fair Use</i> |

Factor 4: Effect on Market for Original

| <i>Check</i> | <i>Weighs in Favor of Fair Use</i> | <i>Check</i> | <i>Weighs Against Fair Use</i> |
|--------------|--|--------------|---|
| | No significant effect on market or potential market for copyrighted work | | Significantly impairs market or potential market for copyrighted work or derivative |
| | Use stimulates market for original work | | Licensing or permission reasonably available |
| | No similar product marketed by the copyright holder | | Numerous copies made or distributed |
| | No longer in print | | Repeated or long-term use that demonstrably affects the market for the work |
| | Licensing or permission unavailable | | Required classroom reading |
| | Supplemental classroom reading | | User does not own lawfully acquired or purchased copy of original work |
| | One or few copies made or distributed | | Unrestricted access on the web or other public forum |
| | User owns lawfully acquired or purchased copy of original work | | |
| | Restricted access (to students or other appropriate group) | | |
| | <i>Factor Weighs in Favor of Fair Use</i> | | <i>Factor Weighs Against Fair Use</i> |

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