**Fair Use Checklist**  
C. L. Wilson Library  
Missouri University of Science and Technology

<table>
<thead>
<tr>
<th>Name</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Institution</td>
<td></td>
</tr>
<tr>
<td>Course</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td></td>
</tr>
</tbody>
</table>

For each item and every semester, you should review materials you plan to reproduce on Blackboard, in print, or in other ways using this checklist. You should retain a copy of this checklist for each item in order to establish a reasonable and good faith attempt at applying fair use should any dispute regarding your use arise.

In considering the fair use factors below, you are likely to find points both favoring and opposing fair use. This is not a mathematical exercise in counting boxes. By using the boxes, you will see the persuasive strength of your fair use argument and whether your use leans most convincingly for or against fair use.

**Reminder about the exclusive rights of the creator, Section 106 of the Copyright Law:**

1) To reproduce copies  
2) To prepare derivative works  
3) To distribute copies to the public  
4) To perform the copyrighted work (literary, musical, dramatic or choreographic work, pantomime, motion pictures and audiovisual work) publicly;  
5) To display the copyrighted work (literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work) publicly;  
6) To perform the copyrighted work (sound recordings by means of a digital audio transmission) publicly

The four Fair Use factors are found in **Section 107** of the Copyright Law. Fair Use is an exception to the rights of the creator.

**Section 107:**

“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 by 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” — [see four factors below]
**Purpose:** The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes

**Favoring Fair Use**
- Teaching (including multiple copies for classroom use)
- Research or scholarship
- Nonprofit educational institution
- Criticism or comment
- News reporting
- Parody
- Transformative use

**Opposing Fair Use**
- Entertainment/Public Performance
- Commercial activity
- Profiting from the use
- Denying credit to original author
- Bad-faith behavior

**Nature:** The nature of the copyrighted work; (fiction/creative or nonfiction/factual)

**Favoring Fair Use**
- Published work
- Factual or nonfiction based
- Important to educational objectives

**Opposing Fair Use**
- Unpublished work
- Fiction
- Highly creative work (art, music, novels, films, plays)

**Amount:** Amount and substantiality of the portion used in relation to the copyrighted work as a whole

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

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

**Effect:** The effect of the use upon the potential market for or value of the copyrighted work

**Favoring Fair Use**
- Restricted access
- One or few copies made
- User owns lawfully purchased or acquired copy of original work
- Lack of licensing mechanism for digital excerpt

**Opposing Fair Use**
- Making content publicly available
- Numerous copies made
- Could replace sale of copyrighted work
- Affordable permission or reasonably available licensing mechanism available
- Repeated or long-term use
Definitions and Clarification:

Criticism or comment
In the course of teaching and research it is often necessary to add commentary to a work or to critique a work. Instances would include things like critiquing a literary piece, paraphrasing or summarizing another's ideas for the purpose of analysis, or quoting a portion of a work in the process of writing a review.

Read more: Commentary and Criticism from Stanford

News reporting
News reporting gets explicit mention in Section 107, the fair use exemption. One example of Fair Use in the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* is a “summary of an address or article, with brief quotations, in a news report.”

Read more: Summary of Núñez v. Caribbean International News, Corp

Nonprofit Educational Institution
Uses of copyrighted materials for nonprofit educational purposes are generally considered more favorably than commercial purposes in matters of fair use, however, not all nonprofit educational uses are fair use! All use must pass the full fair use analysis whether commercial or educational.

Parody
A parody is generally a derivative work, an exclusive right of the creator. Parody, however, is often found to be a fair use in case law. The notorious Pretty Woman case (Campbell v Acuff-Rose) uses this definition of parody: “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule.”\(^1\) The Court said “Parody needs to mimic an original to make its point, … whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” The court also noted “parody may or may not be fair use…” Parody does not guarantee an automatic fair use designation. In many cases, a parody may employ a significantly larger amount of the work, and often uses the heart of the work in order to be recognized.

Read more: “Parody Cases” from Stanford; introduction to “Three Years After Campbell v Acuff-Rose Music…” by Kathryn Piele

Transformative use
Transformative use is an extension of the first factor which looks at the use of a work. If your use of the copyrighted work adds new meaning, brings new value, or repurposes a work, you have transformed it beyond its original intended use. The problem with transformative work is that you may think a use is transformative, but the judge may not.

Read more: Stanford University’s examples to illustrate successful and unsuccessful transformative work (look for the Harry Potter lexicon case and the Capitol Records Inc. v. Alaujan case). Also see Perfect 10 Inc. v Amazon.com Inc.

Public performance
Public Performance rights are necessary when a video is shown and not related to a teaching activity. Campus clubs and social events that wish to show videos must have permission or public performance rights. Any event that is open to the public is a public performance and needs public performance rights.

---
\(^1\) Campbell V Acuff-Rose Music, Inc – 510 U.S. 569 (1993)
Student organizations can work with the Office of Student Involvement to obtain public performance rights. For faculty, the library can assist you and guide you to permissions agencies. Contact the copyright support team.

Denying credit to original author
Attribution is not written into copyright law; however it is an expected professional courtesy and practice. You should cite sources you use in your writing or creations to avoid plagiarizing. Read more: UMKC Libraries' guide to attribution and plagiarism

Bad faith behavior
Essentially, Fair Use is based on a good-faith effort to make a determination of whether your use is fair. If you are aware that your use of a work is likely not fair, but persist in your use, the first factor will never be in your favor. This action could be very damaging to your defense. Thoughtful analysis using a tool such as this checklist shows good-faith behavior.

Publication: Published vs. unpublished
Historically, unpublished works received perpetual protection, but this was changed with the 1976 Copyright Act. Copyright duration now applies equally to both published and unpublished works; however a legislative enactment postponed this new rule until 2003. Check the copyright term chart from Cornell to determine whether a work is copyright protected. Note that unpublished works have typically received more protection in the courts. Read more: Defining “publication” from the U.S. Copyright Office (under the heading “Publication”); “Copyright Term and the Public Domain in the United States” from Cornell for dates of copyright coverage.

Important to educational objectives
When evaluating your use and determining what material you will use and how much, it is crucial that the use is integral to your educational objectives. When showing a film, make sure that you are only showing the amount that is required for the point. If your use does not tie into any educational objectives or is only tangential, it is less likely to be fair.

Amount
Amount can be a tricky factor. There are no amounts or percentages in the law. If you have heard of percentages, those most likely come from guidelines developed over the years by publishing and library groups. Copyright scholars seem comfortable with approximately 10% or one chapter of a work. When using copyrighted work, use the least amount necessary. Note however, that some fair use cases have been lost over a concept known as “heart of the work,” where as little as 400 words were too much. Read more: Stanford’s definition and “de minimis;” also related is Georgia State (Cambridge University Press et al. v. Patton et al.)

Heart of the work
If you have chosen the “heart of the work,” a much smaller amount might fail the fair use test. The “heart of the work” of a book might be the pages with the key turning point of a story or the revealing motivation for a person's action. For a song, it might be the 4 second refrain that is recognized worldwide, across generations. You may have more leeway with amount when you are creating a parody. Read more: Warren Publishing Co. v. Spurlock and Los Angeles News Service v. KCAL-TV in the Stanford case summaries; Harper & Row v. Nation Enterprises.

Restricted versus open access
Whenever possible, restrict access to the students in your class so the audience size and market impact is small. Post material in Blackboard or other password secure areas. In working with media, streaming is a
best practice that prevents redistribution. Watermarking can also prevent reuse in many cases. Posting copies to an open webpage or placing a stack of photocopies in a public place could compete with the original and may impact the market for the work. It also may violate the rights holders’ right to redistribution and display. If you need help restricting access, please contact the Copyright Support Team (umkccopyright@umkc.edu).

**Lack of licensing mechanism for digital excerpt**

This is a concept that needs further refinement by the courts. A licensing mechanism refers to an avenue for obtaining necessary permissions or licenses that permit use of a copyrighted work. Two agencies that market permissions are the Copyright Clearance Center and Swank Motion Pictures, but there are many others. If a licensing agency exists that makes it convenient to obtain permission in a timely manner, this fact can weigh against fair use. The question for academia is whether the existence of such an agency negates fair use altogether. The Georgia State University e-reserves case suggests that had publishers provided a convenient way to license digital excerpt (selected portion or chapter) of their books, this may have impacted the decision. In American Geophysical Union v Texaco, Inc, Texaco lost its case in part because it did not use a licensing agency for article reprints in print form. If you feel your use has significant market effect or otherwise is not fair and you will need to obtain a license, contact the Copyright Support Team for direction on seeking permission from the right agency and possible help with funding. (umkccopyright@umkc.edu)