The Macdonald-Kelce Fair Use Checklist

Introduction to the Checklist: The Fair Use Checklist and variations on it have been widely used for many years to help educators, librarians, lawyers, and many other users of copyrighted works determine whether their activities are within the limits of fair use under U.S. copyright law (Section 107 of the U.S. Copyright Act). Fair use is determined by a balanced application of four factors set forth in the statute: (1) the purpose of the use; (2) the nature of the work used; (3) the amount and substantiality of the work used; and (4) the effect of the use upon the potential market for or value of the work used. Those factors form the structure of this checklist. Congress and courts have offered some insights into the specific meaning of the factors, and those interpretations are reflected in the details of this form.

Benefits of the Checklist: A proper use of this checklist should serve two purposes. First, it should help you to focus on factual circumstances that are important in your evaluation of fair use. The meaning and scope of fair use depends on the particular facts of a given situation, and changing one or more facts may alter the analysis. Second, the checklist can provide an important mechanism to document your decision-making process. Maintaining a record of your fair use analysis can be critical for establishing good faith; consider adding to the checklist the current date and notes about your project. Keep completed checklists on file for future reference.

The Checklist as Roadmap: As you use the checklist and apply it to your situations, you are likely to check more than one box in each column and even check boxes across columns. Some checked boxes will favor fair use and others may oppose fair use. A key issue is whether you are acting reasonably in checking any given box, with the ultimate question being whether the cumulative weight of the factors favors or turns you away from fair use. This is not an exercise in simply checking and counting boxes. Instead, you need to consider the relative persuasive strength of the circumstances and if the overall conditions lean most convincingly for or against fair use. Because you are most familiar with your project, you are probably best positioned to evaluate the facts and make the decision.

Further Information: You can learn more about fair use from many sources, including the website of the Copyright Advisory Office of Columbia University: www.copyright.columbia.edu. Or, see the Macdonald-Kelce Copyright Research Guide here: http://libguides.utopia.ut.edu/copyright

This introduction created by Kenneth D. Crews (Columbia University) and Dwayne K. Buttler (University of Louisville). Adapted for use by the Macdonald-Kelce Library at the University of Tampa February 25, 2013.

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Fair Use Checklist
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Is there something you want to use for class, but aren’t sure if your use is a copyright infringement? We’ve put together this checklist to help you distinguish fair use from infringement.

Use the following checklist to determine whether your proposed use of a copyrighted work is appropriate within the scope of fair use. If you have questions contact Marlyn Pethe, David Davisson, Jeanne Vince, or Shannon Spencer for assistance.

FAIR USE: The part of copyright law that permits limited use of copyrighted material without acquiring permission from the rights holders. There are significant fair use exceptions for research, scholarship, and teaching. Material used for class should only be available for the number of students in the class. Do not post materials on the open web (use Blackboard, LiveText or other password protected platforms), and if you make handouts, make only enough for the class. The fair use rules for creating packets of course readings at photocopy shops are different than the rules described below. Most material in course packets prepared at photocopy shops will need copyright clearance from the copyright holder.

Date:

Name:

Class or Project:

Course and Term:

Citation/Description of work to be used:

Portion(s) to be used (e.g., pages/minutes/percentage):
**Instructions:** Where the factors favoring fair use outnumber those against it, reliance on fair use is justified. Where fewer than half the factors favor fair use, instructors should seek permission from the rights holder. Where the factors are evenly split, instructors should consider the total facts weighing in favor of fair use as opposed to the total facts weighing against fair use in deciding whether fair use is justified. Not all of the facts will be present in any given situation. Check only those facts that apply to your use. *No single item or factor is determinative of fair use.*

Complete and retain a copy of this checklist in order to establish a “reasonable and good faith” attempt at applying fair use standards should there be any dispute.

**Factor 1: Purpose and Character of the Use (check all that apply)**

*Weighs in Favor of Fair Use*

- _____ Nonprofit educational institution
- _____ Used for purpose of teaching (including multiple copies for classroom use) and/or scholarship or criticism, comment, news reporting, or parody
- _____ Used for noncommercial, nonprofit educational use
- _____ Transformative (use changes work for new utility or purpose)
- _____ Use is necessary to achieve your intended educational purpose

*Weighs Against Fair Use*

- _____ Commercial activity, profit from use
- _____ For public distribution
- _____ Used for entertainment
- _____ No attribution for original author
- _____ Use exceeds that which is necessary to achieve your intended educational purpose

**In the spaces below mark the category containing the most checks.**

- _____ *Factor 1 weighs in favor of fair use*
- _____ *Factor 1 weighs against fair use*
Factor 2: Nature of Copyrighted Work (check all that apply)

*Weighs in Favor of Fair Use*
- Published work
- Factual/informational and educational in nature or nonfiction work
- Non-consumable work (i.e. not a workbook or test)

*Weighs Against Fair Use*
- Unpublished work
- Fiction or highly creative work (art, music, novels, films, plays, poetry)
- Consumable work (workbook, test)

In the spaces below mark the category containing the most checks.

- Factor 2 weighs in favor of fair use
- Factor 2 weighs against fair use

Factor 3: Amount and Substantiality of Portion Used (check all that apply)

*Weighs in Favor of Fair Use*
- Small portion of work used (no more than 10% of work not divided into chapters or having less than 10 chapters or no more than 1 chapter of a 10 or more chapter work)
- Portion used is not central or significant to entire work as a whole
- Amount taken is narrowly tailored to accomplish a demonstrable, legitimate purpose in the course curriculum and is narrowly tailored to accomplish that purpose

*Weighs Against Fair Use*
- Large portion or entire work used (more than 10% of work not divided into chapters or having less than 10 chapters or more than 1 chapter of a 10 or more chapter work)
- Portion used is central to work or “heart of the work”
Amount taken is more than necessary to accomplish a demonstrable, legitimate purpose in the course curriculum or is not narrowly tailored to accomplish a demonstrably legitimate purpose in the course curriculum.

In the spaces below mark the category containing the most checks.
- Factor 3 weighs in favor of fair use
- Factor 3 weighs against fair use

Factor 4: Effect on Market for Original (check all that apply)
Weighs in Favor of Fair Use
- Permission for digital excerpt is not readily available at a reasonable price
- User owns lawfully acquired or purchased copy of original work
- Use stimulates market for original work
- Access limited to students enrolled in course for only the term of the course

Weighs Against Fair Use
- Permission for digital excerpt is readily available at a reasonable price*
- User does not own lawfully acquired or purchased copy of original work
- Use impairs the market or potential market for original work
- Access not limited (i.e. placed openly on the Internet)

In the spaces below mark the category containing the most checks.
- Factor 4 weighs in favor of fair use
- Factor 4 weighs against fair use

* An increasing number of publishers are making digital excerpts available. A good-faith effort should be made to determine if a digital version of the work, or excerpt of the work, you are using is available from the publisher at a reasonable cost.
Completed Analysis:

_____ Based on the fair use analysis completed above, I have determined that my use of the material is fair use.

_____ Based on the fair use analysis completed above I have determined that my use of the material is not fair use. I will attempt to obtain permission from the copyright owner before using the material(s).

Signature: ________________________________

Revised for use by the University of Tampa based on the University System of Georgia fair use checklist:
http://www.usg.edu/images/copyright_docs/fair_use_checklist.pdf

The contents in this checklist are suggested guidelines and do not serve as legal advice.