

**Is There a Chilling of Digital Communication? Exploring How Knowledge and Understanding of the Fair Use Doctrine May Influence Web Composing**

Martine Courant Rife, MA, JD, WIDE Research Center, Michigan State University, courantr@msu.edu

Bill Hart-Davidson, PhD, WIDE Research Center, Michigan State University, hartdav2@msu.edu

**ADDENDUM 1:** summarizing how the students and teachers answered the questions (for detailed explanation of answers please see **ADDENDUM 2: Fair Use Answers**):

**Is it Fair Use, or not?**

Correct answer highlighted. Questions: Part I	T	F
1.As long as you use less than three minutes of a song, it is Fair Use.	4%	94%
2.As long as you use less than ten percent of a written work it is Fair Use.	26%	74%
3.Texts in the public domain can be incorporated into webpages without a Fair Use determination.	93%	7%
4.As long as you use someone else's copyrighted work for non-profit educational use it is Fair Use.	52%	48%
5.It is never necessary to ask permission of an author to use her copyrighted work if you are making something pursuant to a class assignment or to present in class.	33%	67%
6.You are more likely to be within Fair Use when using something that is factual rather than when you are using something that is creative.	63%	37%
7.As long as you attribute the original author and use only a reasonable amount of any written work, you are within Fair Use.	52%	48%
8.You are less likely to be within Fair Use if you create something from a copyrighted work that could impair a future market opportunity for the owner of that copyrighted work.	93%	7%
9.Turning another author's copyrighted short story into a play transforms the work such that the play will be a Fair Use and will not infringe upon the other author's copyright of the short story.	11%	89%
10.The use of someone else's unpublished works is more likely to be a Fair Use than using someone else's published work.	19%	81%
11.Using someone else's copyrighted work for educational but for profit use is more likely to be a Fair Use than using that same work for non-profit/non-educational use.	4%	96%
12.Generally speaking, the less you copy, the more likely you will be within Fair Use.	63%	37%
13.If you are going to use a copyrighted work for a Fair Use that is certain, you have the right to legally compel the owner of that copyrighted work to turn it over to you so that you can use it (Fairly).	44%	56%
14.If you are copying journal articles for research purposes even though you might make copies for the entire class of 25 students, you are likely within Fair Use because it is for research.	48%	52%
15.Quoting from someone's copyrighted news blog is less likely to be a Fair Use than quoting from someone's copyrighted newspaper article.	7%	93%
16.The most important factor in deciding whether something is Fair Use is – did the person using the copyrighted material give credit to the author.	37%	63%

**Is the Fair Use Doctrine triggered? I.E., do you have to do a Fair Use Analysis? Or is Fair Use irrelevant. Just answer the best you can.**

Correct answer highlighted. Questions: Part II	Yes	No
1. In your webpage you are using an image you drew by hand in Adobe Photoshop. Do you have to make a Fair Use determination about using this image?	4%	96%
2. You are using a large chunk of text (1,000 words) in your webpage written by your friend. He's given you express written permission to use this text in your webpage. Do you have to make a Fair Use determination about using this text?	26%	74%
3. For a class presentation, you are preparing a 10 minute movie that reinterprets a poem written in 1982. The words of the poem are included, but to the poem you add images and song clips. The poem, images, and song clips are all copyrighted by someone other than yourself. Do you have to make a Fair Use determination about using these materials?	78%	22%
4. You do a search on the Creative Commons website for an image that allows you to use it as long as you attribute the original author and use for educational use. You decide to use this image for a class webpage/class webpage assignment. You attribute the original author. Do you have to make a Fair Use determination about using this image?	22%	78%
5. Same fact pattern as number four above, except this time you use the Creative Commons non-commercial attribution image on a commercial website you've created for your friend's roofing business and you don't attribute the original author. Do you have to make a Fair Use determination about using this image?	81%	19%
6. You're working on a webpage that talks about the history of invention. You are going to scan in advertisements for Edison's incandescent light bulb and then incorporate them in your webpage. The advertisements you locate are originals and were published on December 28, 1878. Do you have to make a Fair Use determination about using these images?	22%	78%
7. You decide to use five pages of a seven page ninth circuit court decision on your website. You want to cut and paste all five pages directly onto the html page you are working with. You will not edit or comment on the court opinion, nor does your webpage allow commenting by others. Do you have to make a Fair Use determination about using this text?	44%	56%
8. You have located an online article that describes how to construct a computer keyboard holder from wood that will tilt the keyboard to relieve carpal tunnel symptoms. Your wrists have been hurting. You decide to follow the directions in the online article in order to build the exact keyboard holder that you will use while you are constructing a major webpage project. With respect to building the keyboard holder do you have to make a Fair Use determination?	7%	93%
9. You decide to type up most of the local phone book listings exactly as they appear (this is a traditional yellow pages phone book) with no modifications and keep them on your website. Do you have to make a Fair Use determination about using this text?	22%	78%
10. You are creating a webpage about brown dogs. Before creating an image of a brown dog in Adobe Photoshop, you review ten other drawings	4%	96%

of brown dogs from differing sources; all of the drawings are similar. Your drawing turns out to be similar as well. Do you have to make a Fair Use determination about using your drawing?		
11. You want to scan in IRS Form 1040 so that you can make it easier for your friends to find. The Form will appear on your website exactly as the original. With respect to the Form do you have to make a Fair Use determination?	30%	70%
12. You scan in something you drew in third grade. You want to incorporate this scan into your webpage. Do you have to make a Fair Use determination about using this image?	0%	100%

**What do you think?**

**Choose the answer which most correctly answers the question posed in the following fact patterns.**

Correct answer highlighted. Questions: Part III								
<p>1. You have just finished composing a webpage that will be used during an educational conference at Michigan State University. The webpage contains several images in a variety of colors. You've created all the images purely "from scratch" yourself in Adobe Photoshop and carefully set them in the page. In the center of the page is a small amount of text and the title, "Everything about Taking Care of Cats." Before giving your presentation, you do a quick google search to locate additional information. You find AL's webpage -- similarly titled to yours, with almost identical images and text placed in almost identical locations. You have never seen this page before, and the author's name is totally unfamiliar. You check the source code and note the page was created two years earlier than your page. Your next step should be:</p> <p>a. Redo or change the webpage you've created so that it is substantially different than AL's.  b. Contact AL to get permission from AL for your webpage.  c. Proceed with your webpage unchanged.</p> <table border="1"> <tr> <td>A</td> <td>B</td> <td>C</td> </tr> <tr> <td>19%</td> <td>22%</td> <td>59%</td> </tr> </table>			A	B	C	19%	22%	59%
A	B	C						
19%	22%	59%						
<p>2. For the last three years you've taught a cooking class to a local neighborhood group where you live in East Lansing. The course materials you always include are five pages from a 50 page cookbook (copyrighted by someone not yourself). You are now preparing course materials for year four, is using the five pages a Fair Use?</p> <p>a. Probably yes.  b. Probably no</p> <table border="1"> <tr> <td>A</td> <td>B</td> </tr> <tr> <td>63%</td> <td>37%</td> </tr> </table>			A	B	63%	37%		
A	B							
63%	37%							

3.Regarding question number two above, same fact pattern, but in this case the cookbook you are borrowing from won the American Cooking Association's Recipe of the Year award in 1998 for the Best Chocolate Torte Recipe. The five pages you are using contain only this recipe and the accompanying visuals. How do these additional facts impact your Fair Use Determination?

- a.More likely to be Fair Use
- b.Less likely to be Fair Use
- c.Irrelevant to the Fair Use determination

A	B	C
12%	18%	70%

4.Mary borrows several quotes from the speech given in 2005 by the CEO of a popular office chair manufacturing company. Mary prints these quotes under photos of antique chairs made in medieval periods in her "Then and Now Funny Stuff" newsletter. Is this use a Fair Use?

- a. Probably Yes
- b. Probably No

A	B
67%	33%

5.Roger takes the lyrics from the Bob Smith 1950's hit song about a beautiful but unnamed woman the singer sees walking down the street. Roger uses the lyrics as captions to popular movie stills of women being assaulted, beaten, strangled, and brutalized. Is the use of the stills a Fair Use?

- a.Probably Yes
- b.Probably No

A	B
44%	55%

6.John owns all the copyrights in a photograph. Mary makes wood sculptures from John's photographs, copying almost all elements in each picture. She then sells these sculptures for thousands of dollars. Is Mary's use a Fair Use?

- a.Probably Yes
- b.Probably No

A	B
41%	59%

7.Rose creates a 10 minute digital video fiction story about a farm family and their animals. The video will be sold in a commercial market and will make thousands of dollars for Rose. In the video, three copyrighted photos appear but only for a split second. They are marginalized in the video, and they are out of focus. The average lay person would not recognize the photos nor their author. Does Rose need to worry about whether the use of the photos in the video is a Fair Use?

- a.Yes, she needs to make sure that she is within Fair Use.
- b.No, she probably doesn't need to worry about Fair Use.

A	B
63%	37%

8.Ken cuts and pastes an entire news article from a commercial news website onto his personal webpage. His webpage does not allow for comments on the article, and he does not change or edit the news article. Is this a Fair Use?

- a.It probably is Fair.
- b.It probably is not a Fair Use.

A	B
33%	67%

9. Same fact pattern as #8 above, except interspersed with the news article are Ken's comments, plus, below the article he's allowed others to comment, and they have.

a. Compared to #8, this is more likely to be a Fair Use.

b. Compared to #8, this is less likely to be a Fair Use.

c. I don't think this changed fact pattern will make any difference in a Fair Use Determination.

A	B	C
45%	11%	44%

10. If the owner of a copyrighted work (the work is posted on the WWW) uses technological measures to stop you from making a copy of the work, but you know that the copy you want to make is a Fair Use, can you use technological measures to circumvent the copyright owner's technological copy-preventing measures?

a. Yes, it's OK to circumvent in this case.

b. No, it's a violation of the law to circumvent technological measures set up to prevent copying.

A	B
40%	60%

11. The owner of a website has numerous copyrighted materials posted within his website. However, in order to get access to the website you have to have access protected by technological measures. Mary needs the images in the owner's website to complete a class project. The copies she wants to make will be Fair Use. Can Mary use technological measures to circumvent the anti-access technological measures set up by the owner so that Mary can get into the website and view, even copy, the owner's copyrighted works?

a. Yes, it's OK to circumvent in this case.

b. No, it's a violation of the law to circumvent technological measures set up to prevent access.

A	B
30%	70%

12. Can the operator of a visual search engine legally use the copyrighted images of another owner as "thumbnails" in the operator's search engine?

a. Yes, this is a Fair Use.

b. No, this is not a Fair Use.

A	B
59%	41%

13. Bob has set up an internet company that will put together movie clips to stream to video retailers. Video retailers will use these clips to entice consumers to buy and rent videos. Is Bob's creation of the streaming movie clips a Fair Use?

a. Yes, it is probably Fair.

b. No, it probably is not within Fair Use.

A	B
37%	63%

14. Same fact patterns as #13, except in this case Bob adds commentary from professional movie reviewers after each and every clip. Bob has permission from the reviewers but not the movie producers. He also rates the movies with his own rating system based on appropriateness for children, educational level, entertainment level, etc. Compared to the fact pattern in #13:

a. This is more likely to be a Fair Use.

b. This is less likely to be a Fair Use.

c. This probably wouldn't make any difference in the Fair Use determination.

A	B	C
34%	30%	33%

15. Inline linking allows an internet service provider to import an image from another website and then include it on the server's website. When someone clicks on the inline link, a separate window opens that displays the full size image within the server's website. Mary is creating a webpage about photography and visual images. On the webpage she creates many inline links to offsite webpages that hold full size images of these copyrighted photographs and visuals. Mary does not make copies of the full size images, but does provide inline links. Is Mary's use of links in these circumstances a Fair Use?

- a. Yes, it probably is.
- b. No it probably isn't.

A	B
67%	33%

16. An author copied over 50% of an unpublished manuscript to prove that someone was involved in the overthrow of the Iranian government. Is this a Fair Use?

- a. Yes
- b. No

A	B
30%	70%

17. A biographer paraphrased large portions of unpublished letters written by a famed author. People could easily go to a university library and read the letters, but the famed author had never authorized their reproduction. Is the biographer's use of the letters a Fair Use?

- a. Likely Yes
- b. Likely No

A	B
59%	41%

18. A company publishes a book entitled *Welcome to Friends: A Complete Guide to Who's Who and What's What*. The book contains quotes, paraphrases, and detailed descriptions of plot, characters, and settings. Is the company's use of Friends' material and information a Fair Use?

- a. Yes
- b. No

A	B
41%	59%

19. A publisher of a pornographic magazine with a circulation of 200,000 makes disparaging statements about a famous evangelist preacher on one page of the publisher's porn magazine. The famous evangelist preacher (Rev. Tom) makes several hundred thousand copies of the page and distributes them as part of a fund-raising effort for his church. Is Rev. Tom's use a Fair Use?

- a. Yes
- b. No

A	B
37%	63%

20. In its news broadcast, a television station uses 30 seconds of a four minute copyrighted video of a famous case of Los Angeles police brutality against a now famed individual. The 30 second video interval contained the most informative, most germane part of the four minute video. Is this a Fair Use?

- a. Yes
- b. No

A	B
59%	41%

21.The entire publications of an online Church were copied and pasted on the internet by several individuals. Is this a Fair Use?

a.Yes

b.No

A	B
41%	59%

22.Same fact pattern as #21 above, except in this case, the copying was done by a newspaper and instead of entire copies, just a few quotations were used. But the newspaper did post the quotations on the internet. Compared to #21

a.This is more likely to be a Fair Use.

b.This is less likely to be a Fair Use.

c.This probably wouldn't make any difference in the Fair Use determination.

A	B	C
63%	19%	18%

23.A person running for public office uses 15 seconds of his opponent's campaign song in a political ad. The ad is broadcast over the internet. Is this a Fair Use?

a.Probably Yes

b.Probably No

A	B
52%	48%

24.An artist creates a cover for *The New Yorker* magazine. The magazine cover artwork uses a humorous view of the city based on the impression of a New York resident. Later, in order to market a movie, a movie producer uses the same elements in a movie poster as found in the copyrighted magazine cover artwork. Is this a Fair Use?

a.Yes

b.No

A	B
22%	78%

25.Richard Williams is a superstar basketball player for a major NBA team. His arms are covered with distinctive tattoos completed by a tattoo artist before Richard achieved fame. Richard now has a \$5 million per year contract with a transnational sportswear manufacturer/retailer. The company just launched an ad campaign which features many photographs of Richard's tattoo bearing arms. The tattoos are featured prominently, clearly, and centrally in the ads. Is the use by the company of Richard's tattoos a Fair Use?

a.Yes

b.No

A	B
70%	30%