

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

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ADDENDUM 2: Digital Copyright/Fair Use Quiz Answers

Disclaimer: All answers are based on the best answer or the most correct answer, but as with any legal question, answers are subject to interpretation and differing contexts. These answers are intended to give direction and guidance to web composers as they make web composing decisions, but cannot be relied on as *legal advice.* For legal advice, you must consult directly with an attorney licensed in your jurisdiction with respect to your individual situation. All answers are based on current US law (March 2006), and on court decisions of various precedent effect.

What do you know?

Fill in the blank (attach additional sheets as needed):

1. If an individual owns 100% of the copyrights in a work, this means the individual has the right to:

If an individual owns 100% of the copyrights in a work it give the individual the right to copy, distribute to the public, create derivative works, and perform/display in public. Pursuant to the statute (106) the individual has the right to:

1. Copy (reproduce) the copyrighted work in copies or phonorecords (a phonorecord is the material object on which the sound is fixed but does not include sounds accompanying motion pictures or other audiovisual works, Section 101).
2. Prepare derivative works of the copyrighted work.
3. Distribute to the public copies of the work by sale, other transfer of ownership, rental, lease, or lending.
4. To perform the work publically (for literary, musical, dramatic, an choreographic works, pantomimes, pictorial, graphics, or sculptural works).
5. To display the work publically (for 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).
6. In the case of sound recordings, to perform the copyrighted work publically by means of a digital audio transmission. (A digital transmission is defined in section 101 as a "transmission in whole or in part in a digital or other nonanalog format).

2. Define Fair Use:

Fair Use is use that is carved out of the limited monopoly, right to exclusive use offered by US copyright protection (Title 17, US Code). Copyright protects original, fixed works by giving the copyright holder the exclusive right to reproduce, perform/display, distribute, and create derivative works. Fair Use is an escape clause from copyright's exclusive use protection. Section 107 defines Fair Use and sets forth what is commonly known as The Four Factor Test :

§ 107. Limitations on exclusive rights: fair use

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—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

3. If an individual owns a license in a copyrighted work, this means the individual has the right to:

Well, it depends what kind of license the individual owns. Each of the rights granted by copyright protection can be parced out. So an individual may own a license to create derivative works based on the original copyrighted work, but may not own the right to copy, perform, or distribute the original copyrighted work. An individual might own the license to distribute a work, but that's it – of course in the case of distribution on the WWW, copying and displaying often take place simultaneously with distribution.

4. Define Public Domain:

The public domain is a space where copyright protection doesn't apply. Copyright protection generally lasts for the life of the author plus 70 years. Works older than that fall into the public domain and can be used freely without a fair use determination. As a general rule, works published before 1923 or earlier are in the public domain. Works of the US government are in the public domain. Copyright holders can also place their work in the public domain through express language. For example, the creative commons website offers a license that gives all rights in a work to the public, thus donating the work to the public. Things which are unoriginal may also be in the public domain, as are works that are unfixed (i.e. items that do not satisfy the requirements to be copyright protected under title 17). Lolly Gasaway has a handy website with public domain guidelines. <http://www.unc.edu/~uncclng/public-d.htm>

5. What is Creative Commons?

The Creative Commons website, a brainchild of the Intellectual Property Law icon Lawrence Lessig, among others, was founded in 2001 and embraces Lessig's political position that the current copyright laws need to be re-legislated by Congress (Band, 2005). In the meantime, Creative Commons (<http://www.creativecommon.org>) provides boilerplate copyright licenses that authors can apply to their work. The licensing scheme established by Creative Commons does not however speak to Fair Use. The legal code of the licenses explicitly states that "Nothing in this license is intended to reduce, limit, or

restrict any rights arising from fair use . . . or other limitations on the exclusive rights of the copyright owner under copyright law . . . “

6. In order to decide whether a use of a copyrighted work is a Fair Use or not, you'd need to consider the following:

These considerations are the four factors under section 107. (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

7. If you want to use a song, poem, visual, or text that is copyrighted and you've decided the use you intend does not fall within Fair Use. What are your options?

You can use it anyway and take your risks; you can try to obtain permission; you can use something else by substitution. Trying to obtain permission of course may be a major research project. Few have the time and resources to obtain permission (other than major publishing companies).

Is it Fair Use, or not?

True/False: Please circle T for True and F for False

1. As long as you use less than three minutes of a song, it is Fair Use.

Answer: False. The four factor test requires that you look at more than just the quantity of the copyrighted work used, although that is one of the factors. In addition to “the amount and substantiality of the portion used in relation to the copyrighted work” you must also consider the nature of the copyrighted work, the purpose and character of the use, and the effect of the use upon the potential market of the copyright holder.

2. As long as you use less than ten percent of a written work it is Fair Use.

Answer: False. The four factor test requires that you look at more than just the quantity of the copyrighted work used, although that is one of the factors. In addition to “the amount and substantiality of the portion used in relation to the copyrighted work” you must also consider the nature of the copyrighted work, the purpose and character of the use, and the effect of the use upon the potential market of the copyright holder. In *Folsom v. Marsh* the defendant had copied 353 pages of plaintiff's multivolume work and the copied material amounted to less than 6% of the total. However, the court held for the plaintiff, finding that defendant had copied the most important material in plaintiff's earlier volumes. In *Folsom* 6% was found not to be fair use.

3. Texts in the public domain can be incorporated into webpages without a Fair Use determination.

Answer: This is true. Remember Fair Use is an exception to the copyright owner's monopoly. But if there are no copyrights in a work, you don't need to use the fair use

doctrine. Works in the public domain are not copyright protected. Therefore you don't need to make a fair use determination before you use such work.

4. As long as you use someone else's copyrighted work for non-profit educational use it is Fair Use.

Answer: False. The four factor test requires that you look at more than just the purpose and character of the use. You should also consider the amount and substantiality of the portion used in relation to the copyrighted work, the nature of the copyrighted work, and the effect of the use upon the potential market of the copyright holder.

For examples to support this see any of the following cases:

Macmillan v. King (1914): A tutor created an outline, incorporating quotes and following the organization of a Harvard University professor's economic textbook. The publisher, Macmillan, brought suit. The court held though the use was noncommercial, it was an infringement, not falling under Fair Use protection.

Wihtol v. Crow (1962): Forty-eight (48) copies of Crow's musical arrangement were distributed to his music students. However, Crow's arrangement was adapted from an existing musical composition. Crow was sued. The court held that copying a song without permission was not Fair Use.

Encyclopedia Britannica Educational Corp. v. Crooks (1982): The court held that the practice of a non-profit educational services cooperative, in taping educational, state-funded television programs for collection and nonprofit, scholastic viewing later, was not a Fair Use.

Marcus v. Rowley (1983): In this case, a home economics teacher was sued for making "fifteen copies of an eleven page excerpt of a thirty-five page cake decorating booklet for her students" (Bartow, 1998, p.11). The court held this was not Fair Use, noting the material was used over several academic years, the excerpts did not give credit to the original author, the original copyright was not copied, and significant portions of the book was copied.

Basic Books v. Gnomon Corp (Brandfonbrener, 1986): Gnomon was a photocopying company located near college campuses. When sued in 1980 by the publisher, it agreed to settle in return for maintaining requirements that no course packs would be copied unless accompanied by written permission of the copyright holder, or a statement from the faculty member certifying the copies were in compliance with Guidelines.

Harper & Row v. Tyco Copy (Brandfonbrener, 1986): A 1981 settlement similar to Basic Books was reached.

Addison-Wesley Publishing Co. v. New York University (Brandfonbrener, 1986): Nine New York University Professors and a photocopy shop were sued by the Association of American Publishers (AAP, the same trade organization behind Basic Books, above) for course packet copying. The case was settled when the University agreed to adopt Guidelines, and if faculty didn't follow the guidelines, they were to be personally liable. After this case was settled, the AAP broadcasted its terms widely, and pressured other universities to adopt similar policies. This campaign was widely successful (Bartow, 1998).

Basic Books, Inc. v. Kinko's Graphics Corp. (1991): Eight academic publishers sued Kinko's for producing course packets for faculty members at the New School for Social Research, New York University, and Columbia University. The court held this was not Fair Use. While all factors were considered, that the use was deemed commercial and nontransformative outweighed the other factors.

Princeton University Press v. Michigan Document Servs., Inc. (1996): Princeton University Press, Macmillan, and St. Martin's Press sued the photocopy shop, Michigan Document Services (MDS). The court reached a decision similar to the Kinko's case, finding MDS's copying to be a willful infringement. Damages against MDS were: \$30,000 statutory damages, \$326,318.52 attorney's fees, and injunctive relief.

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.

Answer: False. Of course, if you are in the habit of never asking for permission regardless, this question is strangely worded. But what it gets to is again whether educational use by itself is enough to make any use a fair use. It is not. Refer to the cases in #4 above for examples of when educational use was not deemed fair use.

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.

Answer: True. One of the four factors looks at the nature of the copyrighted work. Courts generally do not find factual material as “original” and as creative material. For example in *Stewart v. Abend* (1990), the court focused on copyright protection of the owner’s exclusive right to create derivative works and did not find Fair Use. Cornell Woolrich is the author of the story “It Had to be Murder” and *Rear Window* is based largely on Woolrich’s story. When MCA re-released the film, suit was brought. The court held that the film was not a “new work” falling under the protection of Fair Use. The four factors were taken into account by the court: the infringing work was commercial (factor one, purpose of the use), the original work was creative rather than factual (factor two, nature of the copyrighted work), and the re-release harmed the copyright holder’s ability to find new markets (factor four, effect on market). In this case, the creativeness of the infringed work was one of the factors that, added with the others, caused the court to find this use was not fair.

7. As long as you attribute the original author and use only a reasonable amount of any written work, you are within Fair Use.

Answer: False. Attribution of the original author is not a part of the US fair use analysis although courts occasionally look at whether attribution occurred as an element of bad faith or stealing. (On the other hand, attribution is an issue under the ethical doctrine of plagiarism). Again, a reasonable amount speaks to the quantity used, and this is just one of four factors in the fair use analysis. Even if the amount used is reasonable, if it takes the heart of the matter it might not be considered a fair use.

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.

Answer: True. Impairing the future market of the copyright holder is one of the four factors in the fair use analysis and some think it is the most important factor (Bartow).

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.

Answer: False. Turning a short story into a play is creating a derivative work, and the right to create derivative works is one of the exclusive rights granted to the copyright holder (*Stewart v. Abend*).

10. The use of someone else's unpublished works is more likely to be a Fair Use than using someone else's published work.

Answer: False. Using work that is unpublished is **less likely** to be a fair use than using work that has already been published. However, section 107 states that even unpublished work can be used under the fair use doctrine: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

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.

Answer: False. If you believe as some do (Bartow) that the effect on the copyright holder's potential future market is the most important factor, then what matters most is whether the use is for profit rather than whether it is for education.

12. Generally speaking, the less you copy, the more likely you will be within Fair Use.

Answer: True. The amount and substantiality of the portion used is one of the four factors. It is just one factor but in weighing it, the less you take, generally, the more likely your use will be a fair use. Of course even if a small amount is taken if it is the heart of the matter and used for commercial purposes, it might not be a fair use.

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).

Answer: False. While fair use provides an exception to the copyright holder's rights, it does not provide a "right" for others to compel a copyright holder to turn something over. Plus, the right of distribution is one that is granted under 106 to the copyright holder. There is no fair use right to compel distribution.

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.

Answer: False. While section 107 specifically lists copying for "research" as one type of uses envisioned in the statute as fair use, making multiple copies for research, or even for classroom use, is unlikely to be fair use. This is true especially if licensing was available or if the copying of material was planned ahead and part of the regular teacher practice. "Where there is an established market for permissions, there will often be a narrower scope for fair use"
<http://www.utsystem.edu/OGC/intellectualProperty/teachact.htm>. It would appear from the plain language of 107 that copying for classroom purposes should be acceptable since it is a listed exception, but the copyshop cases show that it is not necessarily a fair use to regularly copy in a pre-planned fashion.

15. Quoting from someone's copyrighted news blog is less likely to be a Fair Use than quoting from someone's copyrighted newspaper article.

Answer: False. While one of the considerations in the four factor analysis is the nature of the copyrighted work, in this example the mediums, blog or article, do not have any relevance. There isn't any special protection or extra leeway with either medium.

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.

Answer: False. In the US, attribution is not an element of a fair use analysis. The only exception to this is if a work of visual art is used (section 106A; Section 101 defines visual art as a painting, drawing, print, sculpture or still life photograph existing as a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author – visual art does not include posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication, works made for hire, or any other works not subject to copyright protection). Attribution is important for the ethical doctrine of plagiarism, but is not part of a fair use determination.

THE ISSUE IN THIS SECTION IS: 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.

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?

Answer: No you don't need to make a fair use determination. You hold the copyright in this image. Of course this is assuming the image you drew was original and not a reproduction of someone else's copyrighted image – or a derivative work based on someone else's copyrighted material.

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?

Answer: No. Since your friend gave you written permission he's given you a license to use the text. Since you have a license to use it you do not need to make a fair use determination as long as you use within whatever terms he may have specified in his written permission.

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?

Answer: No assuming this is an in-class face-to-face presentation and the materials used were legally obtained. The wording of the question here is ambiguous. Section 110(1) states that in-class performances are not infringing of copyright:

Notwithstanding the provisions of section 106, the following are not infringements

of copyright: (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.

If the presentation was made for a virtual class, it might also be deemed to be not infringing under 110(2) as long as “reasonable and limited portions” of copyrighted works were used, the work was performed/displayed under the supervision of an instructor, directly relate to the teaching content, and is limited to “students enrolled in the course for which the transmission is made.” Section 110(2) is also known as the “Teach Act” – it gives some relief from copyright liability to teachers teaching online distance education, but not as much as teaching in f-2-f environments. See <http://www.utsystem.edu/OGC/intellectualProperty/teachact.htm> for more information including a checklist of almost 20 conditions that must be met for a use to fall under the purview of 110(2) – the Teach Act.

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?

Answer: No. The creative commons site sets up a licensing scheme; in this particular scenario, the license requires attribution and educational use. As long as you use within the stated licenses, you don't have to make a fair use determination.

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?

Answer: Yes. You can still use the image outside of its license but you will either need to make a fair use determination or accept the risk of legal consequences (question should contain assumption that you don't want to risk legal consequences). The creative commons website specifically states: “Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use . . . or other limitations on the exclusive rights of the copyright owner under copyright law . . . “

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?

Answer: No. These items should be in the public domain.

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?

Answer: No. Federal Government documents generally aren't copyright protected. See Section 105, title 17.

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?

Answer: No. Copyright protects expression. Methods and ways of doing things are generally protected by patent. Although, if pictures are provided of the finished product, copyright protection might be triggered if you were to call attention to the item you constructed (such as mass producing and selling it).

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?

Answer: No. This is the *Feist* case. Unoriginal databases generally aren't protected under US law.

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 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?

Answer: No. In order for something to be copyright protected it must be original. (*Feist* defines "original" as work containing a "modicum of creativity.") This dog sounds unoriginal or trite and common.

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?

Answer: No. Government documents aren't copyright protected.

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?

Answer: No. Assuming your third grade image was original (not a copy of someone else's copyrighted work), then no.

What do you think?

Multiple Choice

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

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:
 - 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.

Answer: C. In order to be infringing on someone else's copyright there needs to be access and substantial similarity. In this case there is similarity but not access until after the fact.

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?
 - a. Probably yes.
 - b. Probably no

Answer: B. This question refers to the *Marcus v. Rowley* (1983) case where a home economics teacher was sued for making "fifteen copies of an eleven page excerpt of a thirty-five page cake decorating booklet for her students" (Bartow, 1998, p.11). The court held this was not Fair Use, noting the material was used over several academic years, the excerpts did not give credit to the original author, the original copyright was not copied, and significant portions of the book was copied.

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

Answer: B. Here not only is the routine copying taken place, but the heart of the copyrighted work is being used. Therefore it is less likely to be Fair Use.

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

Answer: A. This probably will fit under court definitions of parody.

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

Answer: A. This is similar to the *Campbell v Acuff-Rose*. Roy Orbison/Pretty Woman case.

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

Answer: B. In *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) the court held that such sculptures jeopardized future markets for the photograph copyright owner.

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.

Answer: B. This is likely a *de minimis* use. See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).

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.

Answer: B. Based on the four factor test, since the whole piece was used and was not transformed or used for criticism as far as we know from this fact pattern, it is unlikely to be a fair use.

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.

Answer: A. Here criticism and commentary changes the nature of the use, making it more likely to be Fair Use.

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.

Answer: A. As long as it's a Fair Use, the DMCA doesn't prevent circumventing anti-**copying** measures as long as you legally have access – for example taking screen captures when right click copying is disallowed in order to obtain an image is *not* disallowed by the DMCA as long as the use is otherwise a fair use.

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.

Answer: B. Circumventing anti-access technological measures is prohibited by the Digital Millennium Copyright Act.

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.

Answer: Yes. This was acceptable in the *Kelly v. Arriba Soft* case (2003).

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?
- Yes, it is probably Fair.
 - No, it probably is not within Fair Use.

Answer: B. *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 811 (9th Cir. 2003).

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:
- This is more likely to be a Fair Use.
 - This is less likely to be a Fair Use.
 - This probably wouldn't make any difference in the Fair Use determination.

Answer: A. Again, the presence of commentary depending on its extent may transform the nature of the use. However in *Michaels v. Internet Entertainment Groups, Inc* 5 F. Supp. 2d 823 (CD Cal. 1998) the court found that the posting of adult videotape segments "solely commercial" and that commentary within the tapes did not change the commercial nature. The court also found that the discussion included with the clips was not necessarily connected to a need to see "the portrayal of two people engaged in sexual relations." Also, in *Michaels* the segments used were unpublished.

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?
- Yes, it probably is.
 - No it probably isn't.

Answer: A. *Perfect 10 v. Google* (2006): The court firmly rejected the notion that in-line linking of images directly infringes a copyright owner's public display right. <http://www.eff.org/deeplinks/archives/004433.php>.

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?
- Yes
 - No

Answer: B. Important factors: A substantial portion was taken (half of the work) and the work had not yet been published. (*Love v. Kwitny*, 772 F. Supp. 1367 (S.D. N.Y. 1989).

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

Answer: B. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

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

Answer: B. Important factors: The amount of the material taken was substantial and the publication adversely affected the potential market for authorized books about the program. (*Twin Peaks v. Publications Int'l, Ltd.* 996 F.2d 1366 (2d Cir. 1993).

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

Answer: A. (*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985). The point to be reflected on here is that courts take into account the "badness" or "goodness" of people when they make decisions. With all things being equal, a preacher is more likely to be found fairly using than is a porn king.

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

Answer: No. Important factors: The use was commercial, took the heart of the work and affected the copyright owner's ability to market the video. (*Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

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

Answer: B. Important factors: Fair use is intended to permit the borrowing of portions of a work, not complete works. (*Religious Technology Center v. Lerma*, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996).

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
- This is more likely to be a Fair Use.
 - This is less likely to be a Fair Use.
 - This probably wouldn't make any difference in the Fair Use determination.

Answer: A. The nature of the use as news makes it more likely to be a fair use than individual use. Using less decreases the portion used and again makes it more likely to be fair use. Important factors: Only a small portion of the work was excerpted and the purpose was for news commentary. (*Religious Technology Center v. Pagliarina*, 908 F. Supp 1353 (E.D. Va. 1995).

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?
- Probably Yes
 - Probably No

Answer: A. *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D. N.H. 1978).

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?
- Yes
 - No

Answer: B. *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D. N.Y. 1987)

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?
- Yes
 - No

Answer: B. It is unlikely a fair use since the use takes the whole creation of the tattoo artist and is used for commercial purpose, thus infringing on the tattoo artist's future market.

Acknowledgement: This test is based on Fair Use tests/discussions appearing on the web, including Stanford University Libraries' Copyright and Fair Use website, including the summaries of Fair Use Cases, The University of Tennessee's website, University of Texas Website, and FAQs from the Chilling Effects clearing house.