

## Code of Best Practices in Fair Use for Open Educational Resources



# Code of Best Practices in Fair Use for Open Educational Resources

*A Guide for Authors, Adapters & Adopters of Openly Licensed Teaching and Learning Materials*

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Over time, there will be additional supplementary materials and updates to this code available at [auw.cl/OER](https://auw.cl/oer).

Codes of Best Practices in Fair Use for other creative and professional communities that may complement this code are available at the [Center for Media and Social Impact](#).

For more information about the coordinating organizations please see:

[The Program on Information Justice and Intellectual Property](#)

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# Code of Best Practices in Fair Use for Open Educational Resources

## Open Educational Resources and Fair Use

Educators, librarians, and institutions have invested in the creation of openly licensed, freely distributed open educational resources (OER) to advance a wide range of goals within the educational system. Open educational resources enable flexible and open pedagogy; increase access to authorship and facilitate representation of different student experiences; and increase equity by reducing the barriers of cost in accessing high-quality learning materials. OER exist for all levels of education, from primary to postsecondary, and across disciplines. Creators and users of OER are often motivated by a shared commitment to increase access to materials and to contribute to the common good.

However, to meet the full pedagogical, pragmatic, and social functions of those teaching and learning materials, educators must have the ability to incorporate and reference existing copyrighted content, both historical and contemporary. Uncertainty about the copyright rules that govern these incorporations can warp both what subjects are covered in open educational resources and how those subjects are taught. Fortunately, such uncertainty is not inevitable, and OER makers already have the professional skills and pedagogical judgement they need to make good copyright choices. Indeed, good pedagogy is good fair use practice – a careful understanding of the specific pedagogical purpose of an insert is the foundation of the legal determination that it is fair use.

The fair use doctrine in United States copyright law enables incorporation of a wide range of copyrighted inserts into OER for common teaching and learning purposes. This Code follows on the experience and expertise with community-authored codes of best practices for groups such as documentary filmmakers, art educators, media literacy teachers, and academic and research librarians, which have provided those practitioners with clear, well-documented, and reliable ways to evaluate fair use. National copyright law in many other countries also recognizes these interests, as discussed in Appendix Four. Specifically, fair dealing law in Canada enables a very similar scope to what the Code delineates, as documented in Appendix Three.

Fair use enables the creation of new and different OER – resilient materials that give educators the control and flexibility to meet the needs of their students and the pedagogical goals of their courses. In competition with this vision, subscription- based, one-size-fits-all, and time-limited models restrict the ability of educators to adapt their materials to their students' needs and experiences, while imposing inflexible demands on limited budgets. Educators must also be able to modify and adapt materials to fully meet the needs of all learners, including students with disabilities, marginalized students, and students facing emergent situations, such as disaster or dislocation. Educators should not be constrained to only what commercial publishers choose to offer and the formats they choose to offer it in. When OER authors are able to understand and rely on fair use, it allows them to create materials that are compelling, impactful, and adaptable.

This Code is a tool for educators, librarians, and authors to evaluate common professional scenarios in which fair use can enable them to incorporate inserts, including those protected by copyright, to create OER. It can provide groups working on OER projects with a shared framework for evaluating and understanding when and how to incorporate existing content to meet pedagogical needs.

## Open Educational Resources, Inserts, and Universal Access

At the outset of this project, we spoke to a broad cross section of OER professionals (authors, advisers, librarians, instructional designers, publishers, network organizers, adopters, and more). Some of the findings from those conversations are summarized in Appendix One. Four core conclusions were shared among participants:

- The strategic use of selections from preexisting copyrighted materials – what we call “inserts” in this document – can provide crucial support for pedagogical goals by making OER clearer, more engaging, and more persuasive;
- The use of appropriate inserts can also help make OER more accessible to learners with varying backgrounds, circumstances, and abilities;
- To date, many OER makers have felt constrained to use only Creative Commons-licensed inserts in most cases. However, the kind and range of materials that are available on this basis means that their choices often fall short of fulfilling their pedagogical goals;
- Concerns about copyright compliance limit the effectiveness with which OER makers actually employ inserts by slowing down new projects and by driving practices, such as linking out to sources rather than incorporating them, that reduce the effectiveness and durability of OER. These choices pose particular risks to students with disabilities and students who face other access barriers.

In effect, uncertainty or even misunderstanding about how copyright operates in the domain of educational practice is contributing to suboptimal choices about using textual, visual, audio, and other inserts to improve the quality and reach of OER. As a result, OER makers report feeling faced an unpalatable range of choices where a potential insert is concerned: to leave it out altogether, to substitute a less pedagogically satisfactory alternative, or to invoke it without actually incorporating it – typically by linking to an online location where it can be found on a proprietary website or social media platform, which generally is perceived as a “safer,” if unreliable and potentially costly, work-around.

There are obvious practical reasons to prefer incorporating inserts over linking out – links can change or break, and sometimes they take students to unintended places. But there are principled ones as well. A clear finding from our interviews was that the OER community is strongly committed to principles of accessibility, both in the strict legal sense of the term, and more broadly. Making OER accessible to students with impaired vision, hearing, or physical mobility is both a formal necessity and a pedagogical opportunity – and it is not adequately met by reliance on linking.

Schools and institutions of higher education have legal and ethical obligations to make resources universally

accessible to their communities. Such access reflects educational values and is necessary in order to comply with long-standing legal requirements such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. In cases, such as *Authors Guild, Inc. v. HathiTrust*, courts have strongly affirmed that fair use is an important tool to address accessibility issues, including access by the print disabled to digitized works in a full text database. In sum, fair use can help educational institutions to comply with state and federal disability laws, while also fulfilling their broader missions.

Moreover, schools and institutions increasingly express broader commitments to the principle of accessibility, through ensuring that students with varying life situations and backgrounds have full access to learning opportunities. The theory of “universal design” teaches that when objects of any kind – from chairs to textbooks – are engineered to reach people with accessibility needs, the result is frequently that they become more useful to others, as well. During the COVID-19 pandemic, we became more acutely aware of how self-contained teaching materials available in portable off-line formats (digital or analog) can help overcome barriers to effective distributed learning, including the lack of digital devices or reliable high-speed internet connections. All the more reason, then, to seek greater clarity about how the copyright fair use doctrine can apply to OER inserts.

The OER movement represents a bold and important experiment that faces many challenges. It is inevitable and appropriate that the members of OER community should feel protective of their individual projects and the movement in general, and that this protectiveness may sometimes take the form of risk aversion where “difficult” issues like copyright are concerned. And, of course, there may sometimes be good prudential reasons for OER makers to forgo exercising their fair use rights. But before weighing the benefits of risk avoidance against the costs – which include shortchanging the core mission of making the best possible OER available to the widest possible range of learners – it is important to know what those rights are!

## Behind the Code: Copyright Flexibilities and Fair Use in OER

The good news for OER is that intellectual property law, and copyright in particular, operate as less of a meaningful constraint on otherwise sound pedagogical practice than is generally understood. This is because the rights enjoyed by intellectual property owners are limited, by design, when compared (for example) with property rights in real estate or tangible goods. This, in turn, reflects the fact that where the calibration of intellectual property rights is concerned, policymakers recognize that there are various interests at stake – especially those of information consumers (including teachers and learners). Indeed, it is the public interest in the spread of knowledge that the Constitution identifies as the primary rationale for copyright.

Appendix Five of this Code goes into some detail about various copyright principles that favor broad dissemination of information. Among them are the “idea/expression” distinction and the related “merger” doctrine, which have the effect of assuring that “ideas” (i.e., the facts, theories, and concepts embodied in copyrighted materials) are always available for reuse, and that sometimes (when there are only a few good ways of making a point in words or images), the way those ideas have been expressed is also free for the taking. One consequence is that the real extent of copyright protection for information-heavy objects (such

as a chronological account of a historical event or a table capturing observed data values) is considered “thin” at best, and therefore doesn’t significantly constrain educational reuse. Also reflecting the public interest in access to information is the copyright carve-out for “de minimis use,” which applies to small borrowings of protected material.

The Copyright Act also provides “safe harbors” for some educational uses in Secs. 110(1) and (2). But because these two sections focus on real-time teaching (in both physical and virtual settings), they don’t generally apply to the creation of educational materials as such. On the other hand, neither does the presence of these narrow “specific exceptions” limit the potential reach of the broad, general “fair use” right found in Sec. 107 of the statute – which is by far the most important copyright doctrine operating in favor of OER authors and distributors.

Appendix Two describes the state of fair use law at greater length, but at the outset a few points are worth emphasizing:

- The development of fair use in the U.S. courts over the last 25 years has been rapid and highly positive, and a doctrine that once promised more than it actually offered has been remade as a reliable source of support for an expansive list of artistic and practical undertakings that depend for success on reasonable levels of access to preexisting copyrighted content for use in new contexts.
- The list of activities supported by fair use definitely includes education, as one would expect of a doctrine that exists to help fulfill the constitutional mission of copyright: to promote cultural and scientific flourishing. By the same token, however, not all educational uses are necessarily fair – duplicating entire commercially available textbooks or review materials to distribute to students definitely wouldn’t qualify, for example.
- This is because contemporary fair use doctrine is frequently keyed to the question of “transformative” purpose: does an unlicensed use of copyrighted material have a goal and an audience different from those for which the material originally was created? The inquiry into transformativeness isn’t the only relevant one – it also matters, for example, whether the amount of material being used is contextually appropriate – but it is the invariable point of departure.
- Importantly, the fair use doctrine also works to uphold and fulfill guarantees of equal access to knowledge for those with disabilities, complementing a range of other state and federal laws.
- Fair use is a “unified field theory” in at least two important respects. First, the same analytic approach applies regardless of the setting in which the use occurs, so we can generalize from decisions about (for example) filmmaking to situations involving education; second, fair use applies similarly to all kinds of copyrighted content – text, image, audiovisual works, music, and the like. This helps make fair use a predictable, reliable tool for creators of all kinds.

## Applying This Code

Educators can apply fair use confidently within a consistent legal framework in the repeated professional situations they encounter while authoring, adapting, and adopting open educational resources. The Code

describes an approach to reasoning about the application of fair use to issues both familiar and emergent. It does not provide rules of thumb, bright-line rules, or other decision-making shortcuts. For instance, the Code does not (and could not) prescribe what percentage of a work or word count is permissible to include. Rather it lays out an analytical framework to understand how much of a work, up to or including the whole, is appropriate for a specific purpose, in light of the user's professional goals and other considerations.

Likewise, the Code refers users to generally applicable professional standards, which, in turn, may evolve over time. This is the case, for example, where it invokes the concept of "appropriate attribution" (which might include information about the title, creator, date, publisher, and other characteristics of a work), the scope of which may differ according to the relevant discipline, the nature of the incorporated material, and other context.

Throughout, the Code employs the term "inserts" to refer broadly to the full range of material from third-party sources that educators may wish to incorporate into OER. As the Code itself stresses, these can be of any kind (texts, images, moving images, music, other sounds, computer code, etc.). The reasoning process described here applies equally without regard to the type of inserts involved, or the media in which the OER is distributed.

Fair use is a right. But there may be times when – in the interests signaling support for open resources – an OER author who could make fair use of a particular copyrighted insert to illustrate a point might prefer to use an equally effective one that is in the public domain or is covered by an open license. But there is no legal obligation to do so and no author should ever choose a pedagogically inferior alternative, or forgo using an insert altogether, out of a misplaced concern that relying on fair use is somehow in tension with the goals of open education, rather than aligned with them.

It is important to emphasize that decisions about whether to utilize the Principles of the Code are not affected or limited by the possibility that others may make further uses of the copyrighted material in question. As the law has been interpreted, such "downstream" uses do not give rise to legal liability on the part of educators who themselves have relied appropriately on fair use in making the material available and are not promoting or actively aware of widespread misuse of it by others.

Although the Code has been drafted with a particular emphasis on the creators of OER, its Principles apply with equal force to educators who adopt and adapt existing OER to serve new or additional audiences of learners. Thus, for example, an adapter who wants to add or substitute illustrative inserts in a college-level OER to make a better connection with mature students in lifelong-learning programs can take advantage of the Code's guidance on how to accomplish this.

The Code that follows states four consensus "Principles" that reflect best practices by members of the OER community in applying fair use in certain repeated scenarios. Each of the Principles is given shape by its associated contextual "Considerations," which are integral to application of the Principle. Each Principle is also accompanied by a brief description of "Hard Cases," which reflect agreement about some situations in which educators relying on fair use should exercise special care. Some situations can be analyzed under more than one of the headings that follow, and indeed inserts that are embedded into OER may serve multiple teaching purposes. Further, the Code includes only Principles and Considerations about

which there was near-universal consensus. As a result, these Principles do not necessarily exhaust what is permissible.

More specifically, the Code does not describe all the situations in which fair use might be available to members of the OER community. Rather, it addresses only the most common situations that members of the community encounter. By the same token, the Code's Principles and Considerations are subject to interpretation, and we expect that members of the community will apply and adapt the approaches outlined in the Code to new situations as they arise.

Finally, just as this Code is not exhaustive, it is also not mandatory. For reasons of relationships, risk management, or other considerations, authors and institutions may choose not to claim the full scope of their rights. However, before such risk management decisions are made, it is useful and important to know what those rights are, as a baseline.

# THE CODE: Principles, Considerations, and Hard Cases

## A. Using inserts as objects of criticism and commentary

**DESCRIPTION.** OER, like all textbooks and educational materials, depend upon the inclusion of outside content to enable analysis, critique, and commentary. A textbook offering a survey of modern poetry will be more effective if its arguments about stylistic trends are supported by critical discussions of specific poems included for this purpose. In a film studies course, skills of close analysis are best taught by examining the construction of specific film clips from actual motion pictures, and students of media literacy cannot master the skills needed to assess the truth of claims of political advertising without real-world ads to practice on. All academic fields, including social science and STEM subjects, are replete with additional instances. Sometimes, OER authors will themselves be performing or modeling critique, while at others, they will be providing selected content with which students themselves can engage critically. Either way, OER will be most successful if the authors incorporate the most apposite words, pictures, sounds, etc., as objects of criticism and commentary – including those subject to copyright.

**PRINCIPLE.** Including inserts for critique and commentary represent non- controversial instances of fair use; if an OER is addressing a text, image, or other object directly – or inviting readers to do so – there is no equivalent pedagogical alternative to including that item. The Principle applies without regard to the medium in which the OER is expressed or the platform on which it is housed, and across the full range of source materials, subject to the following:

### CONSIDERATIONS.

1. Fair use inserts for this purpose should generally be restricted to objects or source materials being directly examined. Where inserts are presented so that students can practice critical skills, the OER should also include appropriate guidance such as annotations or reflection questions.
2. The extent to which any insert is included on the basis of fair use should be quantitatively and qualitatively appropriate; thus, depending on the scope of the commentary or analysis, fair use might justify including a whole popular song but not an entire feature-length film if only a portion were being examined.
3. Where the use of multiple inserts in an OER (or a section of one) is pedagogically justified, the author should draw, where possible and appropriate, on a range of source works.
4. Attribution should be provided for fair use inserts, consistent with generally prevailing standards in the discipline; ethical practice also provides students with a good model for their own use.

**HARD CASES.** While there was broad agreement about the appropriateness of including individual inserts when the narrative of a textbook relates specifically to them and is enriched by them, questions remained

about when and how fair use could be employed to create a freestanding OER anthology – for example, a selection of poems for use in contemporary literature courses. Although this might sometimes be accomplished in line with the Principle and Considerations discussed above, depending (among other things) on how much of critical context the collection includes, projects of this type may require individualized legal guidance to evaluate specific cases.

## B. Including inserts for the purpose of illustration

**DESCRIPTION.** Inserts from various sources and media are regularly incorporated into teaching materials for illustrative use, to anchor what is being taught in tangible examples. A lab photograph may engage the attention of a class studying a classic experiment, just as an iconic news image may galvanize students' interest in the 1960's Civil Rights Movement, or clips from a series of Hollywood movies can support an educator's generalizations about how cultural attitudes toward working women have changed over decades. In these instances (and others including quotations from scholarly articles, literary epigraphs, scientific drawings, and many more), the function of the inserts is to reinforce and enrich the pedagogical narrative of teaching materials rather than to function as objects of critique. Such illustrative uses represent the most common category of inserts used in all teaching materials (including OER) and are effectively indispensable to both instructional practice and learning. Typically, illustrative inserts were originally created in non-educational use contexts such as journalism, entertainment, or scientific documentation. Moreover, their learning value is closely associated with their authenticity, so they cannot be effectively "recreated."

**PRINCIPLE.** For the purpose of illustration, fair use supports the incorporation of thoughtfully selected inserts in all subject matter areas, derived from a full range of sources and media, subject to the following:

**CONSIDERATIONS.**

1. When relying on fair use, authors should be prepared to explain the intended significance of an illustrative insert in the context of the OER where it appears; such significance may relate to what the insert depicts or describes, to its relationship to the text, or to the characteristics of the insert itself.
2. Likewise, authors should avoid uses that are exclusively or primarily decorative and do not substantially enrich the pedagogical purpose and narrative of teaching materials.
3. The extent to which any insert is included on the basis of fair use should be quantitatively and qualitatively appropriate in light of its pedagogical relevance; thus, illustrative fair use might justify including an entire photograph, but only a selected segment of a motion picture.
4. In relying on fair use for illustrative inserts, it is important to (i) select illustrations to avoid repetition or redundancy, and (ii) draw or rely, where possible, on a range of source works.
5. Authors of OER should be aware that some texts and images may be free to incorporate because they are subject to limits on copyright protection for factual content.
6. Attribution should be provided for fair use inserts, as discussed above.

**HARD CASES.** Members of the OER community pointed out that there are many ways in which visual,



textual, or musical illustrations can support pedagogy, some quite literal and others more oblique. Thus, the use of epigraphs is a well-established fair use practice, but introducing chapters in a history text with photos of adorable (but otherwise unrelated) photographs of baby animals might be a step too far. And practices that might pass muster in a classroom setting (such as the use of topical cartoons to begin a class period) may be harder to justify in an OER context. As always, the question is one of “nexus” – that is, how persuasive an argument can be made that the insert in question is serving (even indirectly) an identifiable pedagogical purpose.

## C. Incorporating content as learning resource materials

DESCRIPTION. Across disciplines, students often engage with content to build analytical skills, familiarity, or fluency; this practice-based learning is greatly enhanced if those resource materials accurately reflect what they will encounter outside of the classroom. In a beginning Spanish class, students may be exposed to selected episodes of popular TV shows to better understand how native speakers employ the language, while in an intermediate course they may benefit from being guided through readings of selected short fiction. Likewise, a political science course may be enriched if students are exposed to the ways theoretical issues are mirrored in newspaper editorials and op-eds. By their nature, inserts of this kind are likely to be protected by copyright. When they are included in primary or secondary learning materials (including textbooks and workbooks), the intended purpose is neither enabling critique nor providing illustration, strictly speaking, but promoting mastery – by supplying students with essential opportunities to practice their skills and deepen their insights. Sometimes the materials chosen for this purpose are ephemeral in nature, and sometimes they possess more enduring value; however, these materials were created for purposes other than educational use. They often are materials which students would not otherwise have encountered, and they always should be contextualized to enhance their value as learning resources.

PRINCIPLE. Resource materials suited to the learning objectives of an OER may be incorporated in reliance on fair use, subject to the following:

### CONSIDERATIONS.

1. Resource materials incorporated on the basis of fair use should include or reference whatever newly authored contextual materials are required to make them accessible and available to students, and (as appropriate) to direct students’ use of them, including glossaries, annotations, study questions, etc.
2. Although popular appeal may be a factor in the selection of resource materials, authors should be prepared to explain the pedagogical value of each selection beyond its mere entertainment or informational content.
3. The extent to which any insert included on the basis of fair use should be quantitatively and qualitatively appropriate; thus, fair use might justify incorporating an entire short article or story for reflection or response, but not a longer text when students are only expected to engage with a portion.
4. Wherever possible, resource materials should be derived directly from primary sources, rather than

from versions that have been edited or simplified for educational purposes.

5. When consistent with pedagogical objectives, the various resource materials incorporated in a particular OER should be derived from a range of sources, rather than from only a few.
6. Attribution should be provided for fair use inserts, as discussed above.

**HARD CASES.** Although using items of “high value” contemporary popular culture is often permitted for purposes of critique or illustration, members of the OER community voiced hesitation about using them in their entirety (music videos, for example) as resource materials for a more generalized educational purpose. This concern stemmed in part from a perception that these high-profile inclusions were more likely to be challenged, and that it might be difficult to enunciate the pedagogical considerations which were predominant in their selection. OER authors who wish to include materials of this kind should be especially well-prepared to explain their reasons for doing so.

## **D. Repurposing pedagogical content from existing educational materials**

**DESCRIPTION.** Making OER is hard as well as valuable work, and there is little reason to force those who do it to engage in unnecessary reinvention for its own sake. Authors of new OER sometimes want to draw on existing educational materials, and there are a set of considerations in copyright law that allow them to do so in certain cases. Sometimes the source materials were never intended for use as course materials, and these instances can be analyzed in terms of transformative fair use; for example, a nursing program preparing students to interpret patient monitoring systems seeking to illustrate its teaching materials with excerpts from manufacturers’ operating manuals – works originally prepared for a substantially different audience. Other potential source works that were intended for educational purposes have outlived their useful commercial lives but remain protected under copyright law. Here, fair use factors such as the amount of copyrighted material involved and the impact on the market for the original work may come into prominent play. Authors of a new OER biology textbook may want to reproduce the structure of a once-popular predecessor’s chapter on cell-level metabolism, along with only a few specifics of the discussion itself. Or the author of an OER general math book may want to borrow and modify a problem set from an out-of-print algebra text. In each example, the amount of protected material actually involved may be quite limited (after considering the non-copyrightable material), and the risk of economic harm to the copyright owner is somewhat speculative.

**PRINCIPLE.** Fair use supports the selective incorporation of elements from sources which are not currently in wide use as course materials, subject to the following:

**CONSIDERATIONS.**

1. Fair use analysis should begin with a consideration of what parts of the source material copyright actually protects; there are many types of factual content not protected by copyright, as discussed further in Appendix 5.

2. As previously explained, the subject matter, general organization, and broad choices about coverage reflected in existing learning materials – including those that remain popular – are beyond the reach of copyright protection, and so OER makers can reuse them without needing to undertake a fair use analysis.
3. Likewise, OER makers should recognize that the use of short snippets of text from copyrighted sources may be permissible not just as fair use, but also as de minimis quotations.
4. If relying on fair use for more extensive borrowings, OER authors should be prepared to explain the specific teaching or learning value of each incorporated item and why it represents the best choice for the intended purpose; justify the extent of the material incorporated in pedagogical terms; and specify in what ways, if any, the material was updated.
5. A user should be prepared to explain why their OER does not function as a market substitute (either because there is currently no market, or because the incorporated work was or is intended for a different audience than the OER).
6. When possible and as pedagogically appropriate, OER authors incorporating inserts from superseded educational materials should diversify the range of source works.
7. Attribution should be provided for all inserts, a consideration which is of special importance in cases where inserted text may be confused with newly authored text.

HARD CASES: This Principle reflects the fact that even uses that are only modestly transformative can be deemed fair – if they don’t undercut the market for the original. Therefore, if there is a straightforward licensing mechanism for licensing protected bits and pieces of a legacy textbook, that fact may weigh against fair use. Often, however, it is difficult or impossible to negotiate licenses to permit the incorporation of elements from such materials into new OER materials – or even to identify the rightsholder who has the authority to grant such a license. Here, the same rationale that may justify the reprinting of so-called “orphan works” could come into play in support of the OER maker.

## Signaling Fair Use

The OER community is characterized by its commitment to assuring that adoption and adaptation of OER should be as straightforward and transparent as possible. As a result, members of that community emphasized that when inserts in materials are included in reliance on fair use, a clear acknowledgement of this fact would be a “best practice.” This will enable subsequent adopters and adapters in similar pedagogical settings to understand and extend the original authors’ fair use choices. For example, the fair use rationale for using an illustration from a famous experiment doesn’t change when a high-school teacher simplifies an open college-level text about cell biology to a grade-appropriate level. In the shared enterprise of creating, using, and adapting OER, although fair use is a right of individuals, the values of the OER community create a rich environment to communicate the doctrine’s potential for increasing the type and quality of teaching and learning materials.

But what form should such an acknowledgement take, and how can it be accomplished without creating

substantial new burdens on OER authors? Based on our discussions with OER practitioners, we can recommend at least three alternatives:

1. Indirect acknowledgement. It is already a best practice to label individual inserts that are included pursuant to licenses (as is required by the attribution clause in Creative Commons licenses). It also is desirable (and relatively straightforward) to mark “public domain” inserts as such. Reliance on fair use could then be signaled by way of a notice in the front matter of the OER to the effect that “Unless otherwise indicated, third-party texts, images, and other materials quoted in these materials are included on the basis of fair use as described in the Code of Best Practices for Fair Use in Open Education.”
2. Direct acknowledgement. Where OER authors are in doubt about whether the indirect approach will be enough to put downstream adopters and adapters on notice, they could label inserts included on the basis of fair use affirmatively, either with a short narrative text (e.g., “this illustration, from [SOURCE] is included on the basis of fair use”) or a conventional symbol (e.g., [F in a circle]).
3. Hybrid acknowledgement. In this mode, OER authors could use indirect acknowledgement in general, while singling out individual items as to which adopters and adapters might benefit from a more specific notice, perhaps including some indication of the fair use rationale involved, perhaps by reference to the categories of fair uses presented in this Best Practices document.

The choice of a particular form of acknowledgement will depend on the institutional setting, the extent of reliance on fair use in the particular OER, and other considerations. Crucially, however, any of these options would achieve the basic notice function – which the OER community believes will be important as reliance on fair use increases. While it is often useful for authors to maintain their own records of their fair use reasoning, it is not generally necessary to communicate this in the OER itself, beyond clearly indicating which materials were original, and which were incorporated. Participants pointed out that an interested adopter or adapter could – in any event – request additional information from the maker of the OER materials.

# Appendix One: Background findings

Open Educational Resources (OER) are broadly defined as teaching, learning and research materials in any medium – digital or otherwise – that are in the public domain or have been released under an open license that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions. While many similar definitions of OER exist, UNESCO states “OER typically encompass free, online learning content, software tools, and accumulated digital curricula that are not restricted by copyright license and available to retain, reuse, revise, remix, and redistribute.” They have been shown to improve student performance, pace to graduation, and to reduce barriers that particularly impact the most vulnerable students including first-generation, Pell eligible, and students of color.

Over five months in late 2019 and early 2020, our team (Meredith Jacob, Peter Jaszi, Prue Adler, Will Cross and Jeselene Andrade) interviewed approximately 25 people involved in the making and dissemination of OER in both K-12 and higher education. These hour-long interviews, which were conducted under conditions of strict confidentiality, were carefully structured and wide-ranging. We wanted to investigate (1) how well the community understood the relevance of copyright law in the production and adoption of OER, (2) if they perceived it as a significant constraint on their practice, and (3) whether an improved understanding might benefit the OER movement.

When we began our interviews, some members of our team brought more experience with OER communities and practices, while others had a broader background in fair use as applied in library and education settings. These different perspectives allowed us to ask some very basic questions, as well as to pursue more detailed lines of inquiry. Here are some highlights of what we found:

- Makers and distributors of OER form a close-knit and highly motivated sharing community, and are collectively motivated by an idealistic vision of how education at all levels would benefit from the available of low-cost, high-quality, customizable learning materials embodying the principle of universal design as an alternative to commercial textbooks, worksheets, assessment materials, etc.
- From its inception, the OER movement has had at least four major goals:
  - Providing comprehensive, up-to-date, free and low-cost learning materials for all learners;
  - Supporting teachers at all levels of professional development, working in a range of instructional environments;
  - Assuring that learning materials can be readily adapted to meet students where they are, with respect to accessibility, cultural appropriateness, etc.; and
  - Enabling a range of educational practices that reliance on commercial textbooks (print or electronic) may serve to inhibit.
- In general, those active in the movement believe that OER have the capacity to help engage a diverse range of learners more actively and creatively in their own development as independent thinkers and competent participants in civil society.
- Although OER materials should be free to use, they are not free to develop or distribute. Most people who aspire to create OER will need to receive some form of support or compensation (in money or in kind) for their work, and the associated costs of production are themselves non-trivial.

- The internal challenge to the OER movement is twofold: (1) to persuade the educational establishment of the efficacy of its model, and (2) to attract sustainable financial support to defray the real costs associated with it.
- Positive teacher and student experiences with OER are gradually helping to spur adoption and creation, although the process is ongoing. Where financial sustainability is concerned, school systems and educational institutions have recognized the contribution that OER can make toward realizing the goal of “zero textbook cost” (ZTC), and have been willing to provide limited support on that basis.
- In general, however, the other benefits of OER have not been “costed in” to the levels of support its creation and dissemination are receiving.
- The external challenge now facing the OER movement is competition from for-profit vendors, more of whom are moving into this space with products that are being advertised as more cost-effective and more flexible than traditional print but also more “polished” (and superficially more teacher- and student-friendly) than OER. In the past two years this challenge has been exemplified by digital automatic billing programs often marketed as “all-in” or “inclusive access.”
- The shortcomings of these “all-inclusive” products are clear, when contrasted with high quality OER, but so is their appeal.
- One source of that appeal is that their producers are budgeted to license or commission attractive and appropriate textual, graphic, and audiovisual inserts. Like most commercial publishers, these producers also generally have internal procedures for relying on fair use for incorporating third-party content when developing their own materials.

It is likely that the winners and losers in the contest between open and closed models will be determined in the next decade. So, for proponents of OER, there is no time to lose in making their products as appealing and effective as possible.

Which brings us back to the OER-copyright connection, where we should begin by noting that it is a truism that educational practice occupies a highly privileged location in the increasingly well-mapped landscape of copyright fair use. Explicitly identified as an area of special attention in Sec. 107 of the Copyright Act, educational practice frequently represents a straightforward instance of “transformative and non-substitutional” use, to invoke two of the touch phrases in contemporary fair use case law. This is as true of fair uses in making (and using) OER as it is in any other domain of education.

The rationale for relying on fair use as appropriate in producing OER is straightforward enough. Although openly licensed (and to a less extent) public domain sources may sometimes suffice, incorporating the most apt illustrations, reference texts, and other inserts often will mean choosing excerpts from copyrighted works. It’s hard to imagine a class on American poetry taught from materials that don’t incorporate twentieth century poems by well-known writers, an effective media literacy lesson that doesn’t refer to real-world examples of news, commercials, and political ads, or a college-level science textbook that doesn’t include text or figures from significant research publications. Hence, the importance of fair use.

Nevertheless, we came away from our interviews with one overarching conclusion. Most professionals who work with OER often avoid relying on fair use in developing and deploying these learning materials despite recognizing that fair use could enhance their efforts. Participants cited various reasons: uncertainty about the doctrine, concerns about professional responsibility, and doubt about institutional support. they

were anxious about perceived uncertainty and felt little institutional support for doing so. We identified different explanations for and implementations of this general policy of avoidance – and, even, in some cases, identified exceptions to it.

We also learned that while some professionals embrace this state of affairs, many more are (to various degrees) dissatisfied with it. They recognize that, in an uncertain and highly competitive environment, they are being called to do important work with limited resources, and that while some of those limitations may be unavoidable, others – like the effective prohibition on exercising fair use – are wholly artificial and largely self-imposed.

Several factors appear to help explain the existence of this anomalous situation:

- OER professionals experience a dearth of reliable information about copyright in general and fair use in particular. Few have access to specialized legal advice about their projects, and their default is to rely on informal (often online) sources, most out-of-date and inaccurate, and some of them little better than “urban folklore.” Too many sources of information about which the educational community relies on for information about fair use are outdated and overly conservative, thus failing to represent the full scope of the doctrine as it stands today. When these sources do address fair use, they tend to portray it as indeterminate and uncertain – whereas in fact it is both predictable and reliable.
- Specifically within the OER subsection of the educational community, this problem is exacerbated by the fact that trusted guidance documents designed to introduce the OER process to new authors contain statements about copyright and fair use which are not only negatively biased but also significantly inaccurate.
- As a result, members of the OER community share an exaggeratedly heightened sense of risk – both financial and reputational – around fair use. They are aware of a small universe of situations – none of which are analogous to their own – in which individuals (i.e., the defendants in the file-sharing cases of twenty years ago) or school systems (such as, recently and spectacularly, the Houston Independent School District) have paid settlement costs, or even substantial damages. But they often fail to recognize that those cases represented not failed good faith reliance on fair use but out-and-out unjustified infringement.
- Because they understand that fair use determinations are made case-by-case, taking account of the context, many professionals believe that authors of OER relying on fair use would do a disservice to “downstream” users who adapt the materials for use by students with different profiles and different needs, perhaps especially for downstream users in different jurisdictions. Unlike openly licensed inserts, the reasoning goes, those included on the basis of fair use may turn out to be legally unavailable to adopters and adapters – thus undermining the promise of reproducibility and modifiability to which the movement for “open information” in general is devoted. This is a significant concern, but (again) one based on a misunderstanding of underlying copyright principles. Precisely because fair use determinations are contextual, the same outcome is likely where the same material is used in the same or a similar context. Thus, the fair use status of an exemplary news story included in an AP history curriculum for high schoolers will not change because the lesson is transplanted (perhaps in simplified form) to a middle school government course or recast in simplified form for English Language Learners.
- Members of the OER community, like all educators, aspire to model good practice and behavior for

their students. To the extent that they perceive relying on fair use as something suspect or even transgressive – as, in other words, “getting away with” something by cutting corners – they naturally recoil from it. Again, the reaction is based on a misapprehension exacerbated by inaccurate or unsophisticated legal advice. In fact, as the Congress and courts have made clear, fair use is not a breach of copyright etiquette but a user’s “right.” Instead of derogating from the purpose of the copyright system – the promotion of shared knowledge – fair use is designed to promote it.

- The final straw, as it were, is that many (if not most) aggregators and publishers of OER operate under formal policies categorically barring materials that rely on fair use from their platforms or catalogues. While many institutions informally allow noncontroversial fair uses, such as short quotations, they feel that they have no meaningful way to responsibly evaluate or provide guidance about when fair use is acceptable and low-risk.

Because fair use is undervalued or stigmatized, various work-arounds for incorporating copyrighted materials into OER have arisen, including relying on inserts from institutionally licensed digital collections and linking out to copyrighted materials available on the open web. Both tactics have shortcomings that threaten both the value and the reach of OER that rely on them. The coverage of institutional subscriptions differs from place to place, and (in any one place) from time to time. And links can break, or direct students to content that is both distracting and (as in the case of embedded advertising) beyond what teaching institutions wish to promote.

Even more to the point, linked text, video, etc., often is presented in forms that are inaccessible to students with disabilities, as well as those who do not have reliable or consistent access to high band-width internet. It was clear that OER authors and providers experienced tension between their commitment to providing inclusive and equitable access to all materials (including supplemental materials) for all students, including those with disabilities, and their fear of the consequences of copyright law.

In addition, only a fair use-based approach to incorporating inserts into OER can guarantee that the materials in question can be produced and delivered in whatever format (streaming access, digital storage media, paper copies, etc.) students require. Experience in the COVID-19 pandemic emergency is a reminder that if OER is to achieve its objectives, learning materials must be robust and versatile. Materials built by relying on fair use (as well as openly licensed and public domain sources) have this potential; those which rely on work-arounds do not.

Finally, we note that the ability of the OER movement to fulfill its promise is further threatened by another strain in the discourse of the field around copyright. Not only are OER authors being warned about including fair use content in their materials, but adopters are being cautioned against using non-licensed copyrighted inserts when they localize OER for their areas or their classrooms. As already noted, adaptability is a key advantage of OER over commercial learning materials. However, teachers’ and learners’ ability to make best use of OER inevitably will be compromised by draconian (and entirely unnecessary) restrictions about how they should go about revising and remixing them.

To sum up: many OER veterans and newcomers are frustrated by the current situation not only because it makes their work harder, slower, and less satisfying. They recognize that efforts to encourage the adoption of OER in the place of commercial materials will suffer – perhaps fatally – as a result. More fundamentally, they perceive a tension between the OER field’s ingrained hesitance about explicitly relying on fair use and



the accomplishment of its core mission. The tension is real, and efforts to resolve it are not only overdue but urgent.

# Appendix Two: Fair Use Then and Now

## The Fair Use Right and the Function of Copyright

The goal of US copyright law is to promote the progress of knowledge and culture. Its best-known feature is protection of copyright owners' rights, but importantly the law includes protections for the public, too. Copying, quoting, recontextualizing, and reusing existing cultural and informational materials are critically important to creating, spreading, and preserving knowledge and culture, so the law strikes a balance between rightsholder control and public access and reuse.

This balance is part of the social bargain at the heart of our copyright law. Creators get some exclusive rights in new works, not as an end in itself but to encourage them to produce and communicate new knowledge. At the same time, copyright protection is limited to reflect the interests of the law's primary intended beneficiary—the public. So the statute also reflects the access rights of current and future generations of creators, who may want to refer to or invoke copyrighted culture; librarians, archivists, and curators who collect and preserve culture for current and future users; and scholars, teachers, and students who need access to culture for research, instruction, or study.

The public interest limits on copyright begin with the fact that copyright lasts for a limited time. After that, works enter the public domain and are free for use by all. Even so, the duration of protection stretches for generations, far beyond the useful life of most copyrighted materials.

So, there are other limitations that allow the use of material that still is protected by copyright without permission from or payment to the owner. Otherwise, we would all lose the benefit of new work that builds on the past. Fair use is the most flexible and widely applicable of these limitations.<sup>1</sup>

As Section 107 of the Copyright Act of 1976 provides, “fair use of a copyright work . . . is not an infringement of copyright.”<sup>2</sup>

1. Sections 110(1) and (2) of the Copyright Act provide some narrowly defined educational exceptions – relatively useful where face-to-face teaching in a physical classroom is concerned, and somewhat less so for lessons delivered by technological means, including over the Internet. They have no direct bearing on the creation of OER or other learning materials for general circulation. On the other hand, the existence of these does not limit the application of fair use in such situations.
2. In its entirety, Section 107 reads:

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

Fair use has been part of US copyright law for more than 170 years, and was codified in the 1976 Act. Where it applies, fair use is a right and not a mere privilege. The fact that it is asserted procedurally as an affirmative defense should not affect this characterization. Like other rights, fair use derives strength from its flexibility. Rather than following a formula, lawyers and judges assess whether a particular use of copyrighted material is “fair” according to an “equitable rule of reason.” This means taking into account all facts and circumstances to decide whether an unlicensed use of copyrighted material generates social or cultural benefits greater than the cost imposed on the copyright owner. Similarly, practitioners in creative fields can develop analytical structures to evaluate and rely on fair use in the professional situations they encounter regularly.

## Fair Use and Education

Turning to fair use in educational practice, the first thing to be said is that copyright law generally favors this category of uses. Thus, for example, even educators who honestly but mistakenly rely on fair use get a significant break under Sec. 504(c) of the Copyright Act, which waives so-called statutory damages under these circumstances for non-profit schools and their employees. At the same time, however, educational use does not constitute a free pass. In 2019, for example, when a Houston high school systematically reproduced copyrighted review sheets, removed copyright information, and put them online for students, the school district ended up settling an infringement case for millions of dollars.

That said, there are few (if any) genuinely useful judicial precedents about educational fair use. Two radically different stories may be advanced to account for this. In one, the dearth of attention to educational fair use is explained by the fact that education’s highly privileged position in the universe of fair use is too fundamental to have required additional legislative attention or attracted much in the way of court

(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.

challenges. In other words, copyright owners have seldom engaged with the unlicensed use of copyrighted material by educators precisely because they have no strong case, and much to lose in the court of public opinion. In the other account, the explanation is simply that—at least until quite recently—educational uses haven’t generally been a source of particular, sustained concern to copyright owners. Obviously, as the education market grows, that concern is on the rise!

Thus, educators need to know where to look for guidance. Unfortunately, one of the main sources that educators used until recently was the so-called “Classroom Guidelines” that date back to the photocopying wars of the 1970’s. Those guidelines and their various spinoffs are generally useless – or worse – where understanding and implementing today’s fair use is concerned.

Happily, recent judicial decisions still can provide professionals engaged in educational practice – including authors and distributors of OER – strong positive guidance about how to apply the doctrine, by way of analogy. Indeed, there has never been as strong a general judicial consensus about the nature of the fair use doctrine as the one that exists today.

## Fair Use and Access to Educational Materials

Since the Copyright Act’s 1978 codification, accessibility in general has had a privileged place in the domain of fair use, and that’s evidenced in part by the language of the legislative history of Section 107, which discusses providing texts to print disabled individuals as a core example of fair use in action. More recently, judicial applications of fair use have emphasized the ways in which fair use can help to assure that students, teachers, and scholars from all kinds can enjoy equal access to learning. For example, *Author’s Guild v HathiTrust*, 755 F.3d 87 (2d Cir. 2014) held that making a vast corpus of copyrighted books available to learners and researchers was fair use. While resolving one set of issues, *HathiTrust* invites us to think about other ways that the fair use doctrine can be applied to break down the barriers that face many in achieving equitable access to learning materials. Finally, the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, was ratified in 2016. The treaty reflects, among other things, a broad consensus on the importance of designing copyright exceptions in national law to facilitate accessibility.

## The Developing Law of Fair Use

When Congress inscribed the venerable judge-made fair use doctrine into Section 107, it codified the familiar “four factor” test and also included a preamble, listing examples of uses that were eligible to be treated as fair use (including “criticism, comment, . . . teaching, scholarship, [and] research”). The first decade after the 1976 Copyright Act saw generally cautious and even conservative court opinions interpreting Section 107, calling into question the real utility of the doctrine for those who make culture, or comment on it, and teach about it.

Since the early 1990s, however, the case law has taken a dramatic turn. By 2003, when the US Supreme Court affirmed the strong connection between fair use and First Amendment freedom of expression in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the doctrinal landscape had already shifted dramatically. In the intervening time, the courts had indicated that a generally critical consideration in evaluating the fair use factors is whether the use can be considered “transformative”—whether it “adds something new, with a further purpose or different character,” as the Supreme Court put it in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). Since then, cases have reinforced the notion that for a use to be considered “transformative,” it need not— as, in fact, it usually does not—entail a literal modification or revision of the original material. Instead, it is crucial that it has put that material in a new context where it performs a new function – an obvious example being the reproduction of a text or image to illustrate the argument of a chapter in a textbook. The opposite of a transformative use is a substitutional one—a use that merely offers consumers a copy, or a portion, or a version, of the work itself. Understanding the transformative use concept makes fair use much easier to understand and predict.

Where a use is transformative, the first statutory factor (looking to “purpose and character”) will weigh strongly in favor of fair use – even if the new use is “commercial” in character. The second factor (which implicates the nature of the work used) tends to favor transformative uses as well. This factor functions to provide certain imaginative works extra protection from unfair exploitation; however, this concern loses much of its force when they are used for new purposes – especially expository or educational ones. Moreover, where the third factor is concerned, courts will measure the appropriateness of the amount of copyrighted material used against the transformative purpose of that use; thus, in appropriate circumstances, use of an entire work often will qualify.

And crucially, a transformative use is likely to weigh in favor of fair use under the fourth factor directed toward the market harm suffered by the copyright holder. As increasing numbers of courts have recognized, this is because copyright owners are not entitled to control the “transformative markets” for their works. This principle is exemplified by *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), which involved graphic art reproduced to illustrate a historical narrative, or the recent decision in *Marano v. Metro. Museum of Art*, 2020 U.S. Dist. LEXIS 122515 (S.D.N.Y. 2020), which involved using a photo of a musician in performance from the museum’s collection to illustrate a largely unrelated essay about musical instruments that appeared on its website.<sup>3</sup>

3. By contrast, where a use is deemed nontransformative, the market-harm test of factor four is likely to play a more important role in the analysis. Thus, for example, a textbook author’s failure to license biographical summaries of historical figures found on a proprietary website could weigh against a fair use finding. Alternatively, the reproduction of an “orphan” work that is not being actively exploited might be deemed fair on the grounds that the use didn’t interfere with any meaningful market.

## Fair Use in a Nutshell

To sum up, individuals (like OER authors) who are contemplating the use of unlicensed copyrighted inserts would do well to follow the example of today's federal judges, who focus, in effect, on two key analytic questions that effectively collapse the four factors:

- Did the use “transform” the copyrighted material by using it for a purpose significantly different from that of the original, or did it do no more than provide consumers with a “substitute” for the original?
- Was the material taken appropriate in kind and amount, considering the nature of both the copyrighted work and the use?

If the answer to these two questions is clearly in the affirmative, a court is likely to find a use fair.

Obviously, educators and (in particular) authors and distributors of OER should generally fare well under this rubric. That said, a few points are worth reiterating in conclusion.

### *The Fair Use Narrative Matters*

Those exercising the right of fair use need to know what the new function, purpose, or context of their use is, and why they are using the amount they are. This can be done formally, for instance by keeping notes, or informally. The ability of users to explain clearly what they were doing and why has been decisive in many fair use cases. In the unlikely event that an OER creator receives a request to “cease and desist,” the ability to explain their own fair use rationale is an extremely helpful deterrent to litigation.

### *Good Faith Matters*

While it does not appear in the text of the statute governing fair use, courts, lawyers, and potential litigants often take overall good faith into account. As this Code makes clear, creators of OER can show good faith in a number of ways. Having a clear story to tell about why a particular copyrighted insert has been incorporated is one way of demonstrating good faith. Others include providing robust attribution and acknowledging reliance on fair use when it is employed.

### *Fair Use Is Consistent*

Fair use is flexible and context-sensitive, not arbitrary. Fair use treats similar uses similarly. Once you have established that fair use applies to one use of a copyright insert in an OER, that same logic applies the next

time you do it. In this way, fair use can become part of daily practice, and practitioners can rely on it to protect them consistently from case to case.

### *Fair Use Is Predictable*

Choices about whether or not to exercise fair use always involve judgement, and sometimes the flexibility of fair use can lead users to wish for clearer rules or brighter lines. In most cases, however, it is also quite predictable. Moreover, it can be made more so. Even without case law specifically addressing a use, judges and lawyers consider whether the user acted reasonably in light of standards of accepted practice. One way of creating better understanding of what fair use permits is, therefore, to document best practices, as this Code attempts to do.

### *Peer Consensus About Practice Matters*

A documented consensus about fair use in OER is valuable to potential fair users (“What do my peers regard as the right thing to do?”). In addition, it is valuable to potential challengers (“Am I looking at outlier behavior or something that is regular practice in the field?”). And finally, it is valuable to judges (“What do experts in this community regard as good practice?”).

# Appendix Three: Educational Fair Dealing in Canada

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Today, the fair dealing doctrine in Canada is remarkably similar, in purpose and scope, to the US fair use doctrine. It is not unusual for OER makers to assume that fair use is either not available in Canada or is far more restrictive than in the US. This is a mistake. While it may have been true, to some degree, during the 20th century, it is no longer the case. Fair dealing in Canada is now recognized as a broad and flexible user right that enables the fair use of copyrighted materials for educational and learning purposes. The terminology may vary, and certain considerations may be framed or weighted slightly differently, as explained below. However, the general Principles and Best Practices set out in this Code are intended to be equally appropriate for US and Canadian-based OER makers, and for materials destined for use in the United States and Canada alike. As such, if a use falls within a permitted fair dealing purpose, it can reasonably be assumed that a “fair use” in the US will be a “fair dealing” in Canada.

## The Development of Fair Dealing in Canada

### *The Common History of Fair Dealing and Fair Use*

The confluence of fair use and fair dealing should not be surprising—they share the same origins as an equitable doctrine that developed in the courts of the United Kingdom in the 19th century. The judge-made fair use doctrine was codified in the United Kingdom in 1911<sup>2</sup> and in Canada ten years later,<sup>3</sup> while the US fair use doctrine continued to develop in the courts until 1976. Unlike the eventual codification of fair use in section 107 of the US Copyright Act 1976, the statutory fair dealing defence in the UK and Canada set out a closed list of permitted purposes: criticism and review, private study and research, and newspaper summary. These enumerated purposes were then interpreted narrowly by the courts as limiting the availability of fair dealing, while “fairness” was also strictly construed. The development of fair dealing in

1. In contrast to the other appendices that have been authored by the facilitators of the Code, Professor Craig wrote this appendix (in addition to her participation as a legal reviewer).
2. Copyright Act, 1911, section 2(1)(i)
3. Copyright Act, 1921, section 16.



the 20th century explains the general perception that Canadian fair dealing is more limited than its open-ended US counterpart.

## *Fair Dealing as a User Right*

But the fate of fair dealing changed dramatically in Canada with the 2004 ruling of the Supreme Court in *CCH Ltd. v. Law Society of Upper Canada*.<sup>4</sup> In this case, which concerned copies of legal materials made by librarians for their patrons, the Supreme Court of Canada rejected the notion that fair dealing should be strictly construed. Instead, it recognized fair dealing as a positive right of users to be balanced against the rights of copyright owners:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.... "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."<sup>5</sup>

The Court went on to state that fair dealing purposes "must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."<sup>6</sup> Notably, the broad interpretation of "research" allowed the defendant to claim that the Library's copying practices were "research-based and fair" when copying was done on behalf of the patrons as end-users.

Importantly, the Court also set out factors for consideration in assessing the fairness of a use. These factors, drawn from the case law, are almost identical to the factors codified in section 107 of the US law: "the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work."<sup>7</sup> The only additional factor is consideration of available alternatives, discussed below.

While every fairness analysis is context-driven, it seems highly likely that, employing these factors, a fairness assessment in Canada will produce or support the same conclusion as it would in the United States. As stated above, if a use falls within a permitted fair dealing purpose, it can reasonably be assumed that a "fair use" in the US will be a "fair dealing" in Canada.

From this, we can take three broad propositions that point to the similarity between US fair use and Canada's current fair dealing doctrine:

4. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

5. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 48.

6. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 51.

7. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 53.

1. Fair dealing is to be regarded as a positive user right that is integral to the copyright system, its purpose, and its policy balance.
2. The enumerated statutory purposes in Canada are to be liberally interpreted so that they do not unduly constrain fair dealing and user rights.
3. Thereafter, the scope of fair dealing depends primarily on the fairness of the dealing, which is to be determined based on a multifactor analysis very similar to the US fair use factors.

## *The Copyright Pentology*

Another important development in Canada's fair dealing doctrine was the collection of cases dubbed the "Copyright Pentology": five rulings issued by the Supreme Court of Canada in 2012.

Most notably for OER makers, in the *Alberta (Education) v Access Copyright*<sup>8</sup> case, classroom copies made by schoolteachers for their students were included within a "large and liberal" reading of "research and private study". The students' purpose was understood to be "private study" even in a classroom setting: "Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude."<sup>9</sup> The Court explained: "the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore *shares a symbiotic purpose with the student/user* who is engaging in research or private study."<sup>10</sup> Recognizing that the teachers had no "ulterior motive" when providing copies to students, the purpose of facilitating students' studying brought them within the scope of fair dealing.

Also important was *SOCAN v. Bell Canada*,<sup>11</sup> in which the streaming of music samples was found to be fair dealing for the purpose of assisting consumers' "research." Justice Abella stressed that research need not be for creative purposes but "can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest." She also explained: "In mandating a generous interpretation of the fair dealing purposes, including "research", the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair."<sup>12</sup>

These cases reinforced the lessons from *CCH*: Canada's statutory fair dealing purposes should be liberally construed; facilitating an end-user's fair dealing can bring the copier within the relevant purpose; and most

8. *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345.

9. *Id.* at para. 27.

10. *Id.* at para. 23.

11. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.

12. *Id.* at para. 27.

importantly, fair dealing is a user right. More broadly, they confirmed the importance of fair dealing in Canada's copyright system. In the words of Justice Abella:

[U]sers' rights are an essential part of furthering the public interest objectives of the Copyright Act. One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision "must not be interpreted restrictively."<sup>13</sup>

## *The 2012 Copyright Modernization Act*

2012 also saw the enactment of revisions to Canada's Copyright Act that expanded the potential reach of fair dealing by adding to the list of enumerated purposes. In addition to criticism and review, research and private study, and news reporting, fair dealing is now permitted for the purposes of "education, parody or satire."<sup>14</sup>

The addition of "education" as an enumerated purpose is particularly worthy of note. Under the *Alberta* case, facilitating students' studying could potentially bring a copier within the scope of fair dealing where their purposes were "symbiotic" and without "ulterior motive." With the inclusion of "education" as a separate purpose, however, it is no longer necessary for the copier—the maker of educational materials—to step into the shoes of the student: individuals who make copies for the purposes of educating others are themselves engaged in copying for permitted fair dealing purposes. It only remains necessary to establish that their dealing is "fair."

The 2012 amendments also saw the enactment of a non-commercial user-generated content (UGC) exception. Under this provision it is not an infringement of copyright for an individual to use an existing, published work "in the creation of a new work" if the use/dissemination of the new work is done "solely for non-commercial purposes." Attribution of the source is required if reasonable, and the new work must not have "a substantial adverse effect, financial or otherwise, on the exploitation of the existing work" (including by substituting for it). This can be understood as a new, if limited, "transformative use" defence in Canada. The application and limits of the UGC exception have yet to be tested, but it is interesting to note that a non-commercial OER could fit the description of a "new work."

Additional exceptions for educational institutions were also added in 2012. These included, for example, an explicit exception for works available through the Internet, according to which "it is not an infringement of copyright for an educational institution, or a person acting under the authority of one," to reproduce a

13. *Id.* at para. 11.

14. Copyright Act (R.S.C., 1985, c. C-42), s. 29.

work that is “available through the Internet” for “educational or training purposes.”<sup>15</sup> This could bring added reassurance to members of the OER community acting for an “educational institution.”<sup>16</sup>

Finally, with a view to liability risks, it is worth noting new provisions which limit the range of available statutory damages for infringement. Particularly reassuring for non-commercial OER makers operating in Canada should be the range of \$100 to a cap of \$5,000 in total, for all works involved, if the infringement is for non-commercial purposes.<sup>17</sup>

## US-Canada Cross-Border Considerations for the OER Community

As we have seen, there are significant similarities between the US fair use doctrine and Canada’s fair dealing doctrine that should alleviate concerns about cross-border fair use/dealing in the OER community. Indeed, given developments since 2004, Canada’s fair dealing doctrine is effectively “a fair use provision in everything but name only.”<sup>18</sup> In particular:

- The addition of “education” as an enumerated fair dealing purpose (which is to be given a “large and liberal” meaning) should enable OER uses to easily proceed over the first fair dealing hurdle.
- When a dealing is for the permitted purpose of “education” or “private study and research,” the only additional requirement is that the use is “fair.”
- Fairness in Canada is established through a contextual, multi-factor analysis very similar to the US fair use analysis, meaning that fair uses are likely also to be fair dealings.
- Non-commercial OER may also benefit from the UGC exception.
- Additional specific exceptions are available for educational institutions and those acting under their authority.

There are also some remaining minor differences and additional considerations that should be identified for cross-border US/Canada OER initiative:

- *The fair dealing purpose hurdle*: It remains the case that, “[u]nlike the American approach of

15. Copyright Act (R.S.C., 1985, c. C-42), s.30.04. The exception also extends to communication and public performance where that public “primarily consists of students of the educational institution.” Attribution of source is required, and the exception does not apply if it is known that the work was available online without the copyright owner’s consent.
16. Copyright Act (R.S.C., 1985, c. C-42), s.2.
17. Copyright Act (R.S.C., 1985, c. C-42), s. 38.1(1)(b). Under s. 38.1(1)(a), where infringement was for commercial purposes, statutory damages range from \$500 to \$20000 for each work.
18. Michael Geist, “Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use” in Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013).

proceeding straight to the fairness assessment, we do not engage in the fairness analysis in Canada until we are satisfied that the dealing is for one of the allowable purposes enumerated in the Copyright Act.”<sup>19</sup> In order to be fair dealing, use of copyrighted material in OER must (genuinely)<sup>20</sup> be for the purposes of education, or facilitating private study and research. Uses that are, for example, purely attention-grabbing or aesthetically pleasing may not satisfy this first step unless an educational goal can be convincingly articulated. The perception of “ulterior motives” can also weigh against fair dealing (although it should be stressed that commercial uses certainly can be fair dealing).<sup>21</sup>

- *No broad recognition of a transformative use doctrine:* The transformative nature of a use is not a separate or prevailing consideration in determining fair dealing in Canada. It will, however, likely weigh in favour of fairness under, e.g., the “purpose” and “character” of the dealing factors in the fairness determination. By the same token, the lack of transformativeness does not preclude a finding of fairness. The Supreme Court has emphasized that “dissemination of works is also one of the Act’s purposes, which means that dissemination too, with or without creativity, is in the public interest.”<sup>22</sup> OER increases access and dissemination, which weighs in favour of fair dealing. For non-commercial transformative uses that incorporate existing works into “new works,” the UGC exception may also be available.
- *The Additional Fairness Factor—Availability of Alternatives:* This additional factor in Canada’s fairness analysis means that courts considering fair dealing will ask whether “there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work,” or whether “the dealing was reasonably necessary to achieve the ultimate purpose.”<sup>23</sup> If materials would have been “equally effective” without reproducing a copyrighted work, this may weigh against a finding of fairness. Note that this is only one factor in the overall assessment of fairness, however, and it does not require a user to demonstrate that use of a work was necessary or that no alternatives were available. Where a use is reasonably necessary or makes the material more effective in achieving its educational purpose, this should weigh in favour of fairness. Note that, according to the Supreme Court of Canada, “[t]he availability of a licence is not relevant to deciding whether a dealing has been fair.”<sup>24</sup> (This is for the good reason that fair dealing requires no licence.)
- *Additional attribution requirements for criticism, review and news reporting:* Canada’s fair dealing

19. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 at para. 26.

20. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 54 (explaining that “courts should attempt to make an objective assessment of the user/defendant’s real purpose or motive in using the copyrighted work.”)

21. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 54 (noting only that “research done for commercial purposes may not be as fair as research done for charitable purposes.”)

22. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 at para. 21.

23. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 57.

24. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para. 70.

provisions for criticism or review and news reporting contain, as a third hurdle, the need to mention (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer's performance, (iii) maker in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.<sup>25</sup> These acknowledgement requirements have been held to be substantive components of the defence and are not explicitly subject to a reasonableness limit. There are, however, no equivalent acknowledgement requirements in the case of fair dealing for the purpose of "research, private study, education, parody or satire."<sup>26</sup> When fair dealing for educational purposes, acknowledgement of source/author is not required (although it is, of course, still recommended as good practice).

- *Moral rights*: An additional consideration for cross-border OER-makers is the availability of protection of moral rights in Canada. Authors have the right to the "integrity of the work and...where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous."<sup>27</sup> These rights last for the duration of the copyright. Notably, fair dealing is not a defence to an infringement of moral rights. Where attribution is given in accordance with the Best Practices set out in this Code, however, there is unlikely to be any violation of moral rights. The attribution right is subject to a reasonableness condition. While the integrity right can prevent the distortion, mutilation or modification of a work, or its use "in association with a product, service, cause or institution," it is violated only if such use is "to the prejudice of its author's honour or reputation."<sup>28</sup>
- *Crown Copyright*: A final difference is worth noting. Whereas US government works generally belong in the public domain in the United States, in Canada, such materials (those prepared or published by or under the direction of control of Her Majesty or any government department) are typically protected by Crown Copyright. The Crown, as copyright owner, enjoys the same exclusive rights as other copyright owners, meaning that the lawful use of Canadian government works in OER would be subject to the same fair dealing analysis as any other copyrighted works (although, e.g., the nature of the work may weigh in favour of fairness).

25. Copyright Act (R.S.C., 1985, c. C-42), ss.29.1, 29.2.

26. Copyright Act (R.S.C., 1985, c. C-42), ss.29.

27. Copyright Act (R.S.C., 1985, c. C-42), ss. 14.1 and 28.1, 28.2. Performers may also have moral rights in connection with live aural performances or performances fixed in sound recordings: Copyright Act (R.S.C., 1985, c. C-42), ss. 17.1, 28.1, 28.2.

28. Copyright Act (R.S.C., 1985, c. C-42), s. 28.2. Prejudice to honour or reputation requires some form of objective reputational harm beyond the subjective preferences of the author. See, e.g., *Snow v. The Eaton Centre* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.); *Prise de Parole Inc. v. Gvérin, éditeur Ltée* (1995) 66 P.R.R. (3d) 257 (F.C.T.D.).

# Appendix Four: Educational Exceptions and Quotations Rights Around the World

Like its counterparts in other jurisdictions, the US-based OER community aims to produce materials that are as conveniently accessible as possible – and to create opportunities for their adoption and adaptation not only within the US, but in other jurisdictions. This shared objective helps to explain the community-wide preference for the incorporation of inserts (for purposes of critique, illustration, etc.) on the basis of Creative Commons (or equivalently open) licenses, which have world-wide reach, rather on the basis of transactional licensing, which tends to be territorial in scope. Historically, this aspirational bias also has been a factor in concerns about relying on fair use for OER inserts: if this particular exception exists, as such, only in the laws of the US and a large – and, it must be said growing – handful of other countries,<sup>1</sup> could reliance on it actually impede (rather than promote) cross-border flows?

How realistic is this concern? Or, to put it differently, would the copyright laws of other countries also support choices about inserts that US OER authors made on the basis of fair use? It goes without saying that all countries of the world have copyright exceptions for limited, value-added uses of preexisting copyrighted material. But they are expressed differently from one jurisdiction to another. Some inquiry undoubtedly is in order before “porting” an OER from one copyright environment into another,<sup>2</sup> but when it comes to fair use inserts, the practically important question is how onerous the task, and how favorable or unfavorable the results, are likely to be. Based on recent scholarship on comparative copyright law, it seems clear that the inquiry will be fairly straightforward, and the results overwhelmingly positive.

Where to begin the search for relevant legal principles in a non-fair use jurisdiction? The “educational exceptions” authorized in Article 10(2) of the Berne Convention (1971), and in fact provided in many national laws, are a good point of entry. Although it should be noted that in many countries these provisions have not been updated to take account of new applications of digital technology, many do include clauses that allow excerpts from copyrighted materials to be used in “educational publications” generally<sup>3</sup> – thus reaching OER

1. See Jonathan Band and Jonathan Gerafi, Fair Use/Fair Dealing Handbook (May 7, 2013), at <https://ssrn.com/abstract=2333863> or <http://dx.doi.org/10.2139/ssrn.2333863>.
2. This is, of course, also true in any situation where assertedly “public domain” material is present in an OER, because (1) rules for the ascertainment of this status differ from country to country, and (2) authors may not always understand and apply those rules correctly. Likewise, due diligence for adopters and adapters might well extend to checking the CC licenses on which “upstream” authors have relied to be sure that they were properly interpreted in the first instance.
3. See Daniel Seng’s monumental 2017 Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities, at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=337160](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=337160), providing an invaluable at-a-glance reference comparing the laws of 136 countries of the WIPO.

in all formats. Even in jurisdictions that provide no specific allowance of this kind, adopting and adapting OER for strictly intramural use (including – perhaps – those undertaken by way of closed institutional networks) are potentially covered by the nearly ubiquitous clauses authorizing individual teachers’ use of copyright excerpts “for purposes of illustration.”

Moreover, the criteria applied to determine whether particular educational uses of copyrighted material do, in fact, qualify under these exceptions should be familiar to readers of this document: for example, whether attribution was given and whether the extent of the use was proportional to the educational objective. Many national laws also confine these exceptions to non-commercial educational activities – but this is a low hurdle for typical adopters and adapters of OER.

So far, so good. But what about the minority of jurisdictions that lack clear exceptions for educational materials or impose potentially onerous restrictions on those they do recognize? These might include (for example) remuneration requirements, strict quantitative limits, or anti-retention rules. As it happens, there is another (sometimes underappreciated) feature of national copyright laws – the so-called “quotation right” – that may help to fill any gaps and even out any discrepancies where OER inserts are concerned. Unlike educational exceptions, which are merely authorized under Art. 10(2) of the Berne Convention, the quotation right is made mandatory under Art. 10(1), and – one way or another – it is almost universally recognized.<sup>4</sup> In the US, it is not separately articulated because it is folded into fair use, while in the UK it is given expression within the “fair dealing” doctrine.<sup>5</sup> As Professors Aplin and Bently have described, however, Article 10(1):

requires contracting [nations] to permit quotation from a work, and is subject to a series of conditions, the most important of which is that such quotation be in accordance with ‘fair practice’. Importantly, such ‘quotation’ must be permitted whatever the purpose of the use, as long as the material taken is proportionate to the purpose of its user. We suggest that the term ‘quotation’, understood in terms of its ordinary use across the entire cultural sphere, describes a broad range of practices of reuse of copyright-protected material, including in some situations the whole of that material. For sure, the ‘fair quotation’ exception does not encompass every act that currently falls within the US ‘fair use’ doctrine – in particular, private copying and certain technological uses. However, it does require that many transformative expressive uses be permitted if the use is fair, proportionate and appropriately attributed.<sup>6</sup>

As this passage suggests, the criteria for determining whether a particular use falls within the quotation right are likely to be satisfied for an OER insert that has been identified as fair use in the United States pursuant to this set of Best Practices. For example, the UK’s new rules on quotation as fair dealing provide

4. The mandate extends to the 178 countries (out of 195 in the world) that form part of the Berne Union, as well as a few others that have agreed to be bound by the treaty’s substantive norms by way of the TRIPS Agreement, which forms part of the larger 1994 World Trade Organization Agreement.
5. The 2014 amendments to Section 32 of the Copyright, Designs and Patents Act 1988 recognize fair dealing for “the sole purpose of illustration for instruction,” as well as for critique and commentary.
6. Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (Cambridge University Press 2020), at p. 2 (footnotes omitted).



ample justification for the incorporation of copyrighted inserts as objects of critique and as illustrations in OER.

There are a few outlier countries where potential local adopters and adapters of US- made OER should be especially careful about following suit on the inclusion of inserts based on fair use. A striking example is France, where the strong “authors’ rights” tradition has given rise to an especially (if not uniquely) grudging approach to copyright limitations and exceptions. As a consequence, its 2016 law<sup>7</sup> recognizes no exception for educational publications as such, imposes a duty of remuneration on teachers and school using copyrighted works for purposes of illustration, and restricts the quotation right to “brief” excerpts only (in arguable breach of its international treaty obligation to respect the principle of proportionality). Such a deviation from the general norm, in fact, only serves to help “prove the rule” that, overall, fair use inserts in US-made OER should encounter little difficulty under the vast majority of national legal regimes.

7. Art. L122-5.3(e), Intellectual Property Code (amended by Act No. 2016-925 of July 7, 2016).

# Appendix Five: Beyond Fair Use – More Good News About Copyright for OER

In the Code of Best Practices and in the previous appendices, we have addressed in some depth how to understand and apply fair use and how to understand the limitations and exceptions to copyright law, such as fair dealing, that apply in other jurisdictions. However, fair use is not the only aspect of U.S. copyright law, and of intellectual property more broadly, that can apply when creating open educational resources. Without attempting to be comprehensive, we offer below a range of information about low-risk practices to help lighten your burden of legal compliance. These items deal with copyright doctrines other than fair use that may apply to potential OER inserts, as well as to some other areas of IP law about which members of the OER community have expressed concern.

Our goal here is to prune away at various areas of potential concern, indicating situations in which your review might never even reach a weighing of fair use – starting with situations where there is less to copyright than meets the eye. These include situations in which copyright might seem to apply to a source work but actually doesn't: where, that is, the work is in the public domain.

## The Public Domain: Materials and Content not Protected by Copyright

In making a first pass through plans for an OER project, you may identify possibly copyrighted works (images, texts, compositions) that you might like to incorporate as inserts in whole or part. It turns out that some of these works are fair game because they don't enjoy any copyright protection, for one or more reasons.

- You can always use works that have been created on the job by U.S. government employees: NASA videos, White House webpages, Congressional Research Service reports, WPA photographs, opinions by federal judges, and many more are in the public domain. Practically, that means that neither the purpose for which you use such a work, nor the source from which you obtained it, is relevant. This rule (expressed in 17 USC Sec. 105) puts a world of useful information at the fingertips of teachers and learners. However, this rule has some limits, including:
  - Works commissioned by the U.S. government from third parties aren't covered by Sec. 105, because they are created by private contractors rather than regular employees;
  - Some materials created by hybrid agencies, like the Smithsonian Institution, aren't covered;
  - Likewise, state and local government materials, from the texts of regulations to photographs for tourism campaigns, don't fall under the rule, and may be copyrighted, depending on the jurisdiction; and (of course)

- The same is true of material sourced to foreign governments.
- As a practical matter, it's also not safe to assume that everything found in a federal repository (like private correspondence in the National Archives or a presidential library) or published in a federal periodical (like news stories that have been read into the Congressional Record) is free to use – though much of it is.

On the other hand, it's important to remember that all kinds and categories of government-related but nevertheless copyrighted works are potentially subject to fair use!

- More useful material than you might immediately think is available because it has aged (gracefully or not) into the U.S. public domain. And, thanks to the recent congressional decision not to extend copyright term yet again, there will be more such material coming every year. January 1, 2021 liberated both “The Great Gatsby” and, ironically, Irving Berlin’s “Always”). Here is some fairly conservative guidance about taking advantage of this situation:
  - Right now, If something was published (not just created) in the United States before 1926 (meaning that it was offered for sale or given away to consumers), it's safe to conclude that it is in the public domain; and each year on January 1, another year's worth of material is added;
  - By contrast, older works that weren't published when they were created, and later were made available between 1978 and 2002, may be protected through 2047; although,
  - If we put the contents of the previous pesky category aside, it's otherwise safe to assume that a work – domestic or foreign – is in the public domain if all the authors have been dead for at least 70 years; or
  - If it was created exclusively by one or more U.S. nationals, and
    - If it was published before March 1, 1989, and never been registered for with the Copyright Office; or
    - If it was published before 1963 and the copyright was not renewed (again, this applies only to work by U.S. nationals).

And if you have any doubts about whether a work has been registered or renewed, a reference librarian can show you how to find out online.

- Public domain works are always free to use as regards copyright law. But sometimes (especially where unpublished works are concerned) it may be hard to get your hands on a source copy. Of course, if you need the cooperation of a library, museum, or other institution where the original resides, that institution can dictate terms of use and restrict what you would otherwise be able to do as a condition of access. But if you have access to a transcription or reproduction from a different source, you don't need to negotiate with the holder. In addition, many memory institutions assert copyright in their own photographs or digital records of old objects in their collections, even those that circulate widely. But at least where essentially verbatim reproductions of flat objects (images or texts on paper, photographs, paintings, etc.) are concerned, those claims have little merit. Photos of three-dimensional objects (like sculptures) are more likely to enjoy some level of copyright protection. Again, however, such rights are always subject to fair use.
- Another category of public domain works that you can use freely and in their entirety, without needing

to make any more detailed inquiry: works that consist entirely of data or other factual information arranged in common or well-established ways – a chronological list of reigning monarchs, a table of rainfall statistics with the date of the observations along one axis and locations on the other, and so forth, or a pie chart of government expenditures. This is because there is a rule denying copyright protection to data, including data gathering and analysis, and to simple, unoriginal methods of presentation and organization. (Indeed, the law bars copyright in facts of all kinds – even if they have been discovered through the exercise of skill and effort – about which more to follow.) To reiterate – the fact that a simple data set (or representation of data) is in the public domain applies with full force to newly created content as well as historical data.

## Built-in Constraints on the Scope of Copyright

Copyright doctrine also makes it clear that even where a work enjoys copyright protection, not everything found in it can be protected – in other words, the very rules that extend protection are themselves subject to certain intentional constraints on the scope of copyright. In fact, copyrighted sources include more available material than might first be imagined, and a good place to start in assessing the availability of particular content from copyrighted sources is by asking whether the elements you might like to use are actually subject to protection.

Section 102(b) of the Copyright Act puts it thus: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” In effect, that provision encapsulates the so-called “idea-expression” distinction – the proposition that underlying discoveries and insights are just too fundamentally important to be walled off, even though the specific choices about how to present those “ideas” using words, sounds, or visual elements may qualify for protection.

Some applications of this principle are straightforward. Thus, it’s fine if a would-be OER maker is inspired by a commercial textbook author’s college-level survey of American History from a feminist perspective to prepare a set of open materials along similar lines. Oftentimes, though, the application is a bit more complicated. Suppose, for example, that the author of an OER intended to familiarize nursing students with new medical technology wanted to quote at some length from the manufacturer’s operating instructions of a particular imaging device – a work that is obviously rich in unprotected factual elements, but which also may contain some arguably copyrightable choices about how to convey a particular bit of practical information. This is where the so-called “merger” doctrine might come into play. It states that in situations where there are only a limited number of useful ways in which it is reasonable to express a given idea, none of them should be able to enjoy protection! Obviously, this ancillary doctrine makes the idea/expression distinction easier to work with in practical terms.

Likewise, if an OER maker wanted to copy a simple diagram about cell differentiation, borrowing the standard if somewhat arbitrary convention of representing liver cells as purple trapezoids, blood cells as red circles, and so forth, the “scènes à faire” doctrine would assure that these simple design choices are free to

imitate, copyright notwithstanding. This doctrine also applies where, even if one identifiable person is the first author to come up with an idea, that creative choice can become so intertwined with the kind of story being told that it is unprotectable. So the first science fiction author who imagined and described the first contact, “take me to your leader” trope in science fiction, cannot exclude others from using that plot line in subsequent works.

And perhaps the most important implication of the idea/expression distinction for OER makers can be stated as follows: When drawing on source material that enjoys only “thin” copyright because it contains high proportions of unprotected content (whether a scientific diagram or the factual narrative of a famous battle), it is generally easy to work around the protected elements by simply modifying the minor creative elements.

Another, rather different, example of a built-in limit on copyright scope is found in Section 120(d), which provides that buildings that can be seen from public areas can be filmed and reproduced for any purpose. Although there has been copyright in architectural works in the United States since 1990, the Copyright Act includes a special exemption for this kind of depiction. That doesn’t mean, of course, that you’re necessarily free to use someone else’s photograph of a particular building – or to depict a public art piece that stands in front of it. Nevertheless (and once again), fair use may apply in such instances.

Of course, this discussion isn’t exhaustive – there are others that apply to areas of practice adjacent to OER making and distribution, such as classroom teaching (for which exceptions are provided in Section 110 of the Copyright Act) and making materials available to the visually impaired (Section 121). These don’t provide a basis for incorporating unlicensed copyrighted inserts into OER in their own right, but they may enable or enrich teaching practice in specific situations.

And before we leave copyright, one more topic may be in order: Why OER makers can (and sometimes do) get carried away in imagining potential exposure to liability when they copy inserts from protected source materials – even when they are convinced that fair use applies. Sometimes conscientious educators worry that even though their own use of copyrighted material may be justified, they could be held responsible for someone else’s less scrupulous activities: If a digital image of an artwork is incorporated in an OER, a bad actor might take and end up using it to make a tasteless novelty shower curtain! Happily, though, as the Supreme Court pointed out in footnote 12 of *MGM Studios vs. Grokser*, in 2005 – absent some very special circumstances – this “misuse” is the sole responsibility of the downstream infringer.

And what if it turns out that the OER maker was wrong about the fair use justification for a particular insert – acting in good faith, but mistaken nonetheless? Happily, at least for OER makers who work at libraries, archives and nonprofit educational institutions, Section 504(c) of the Copyright Act provides a significant buffer against potential liability in such situations – not a free pass or “excuse,” but a broad enough carveout to make a lawsuit look pretty unattractive to most copyright owners.

## What About Other Areas of Intellectual Property? Trademark Law Considered

In interviews and workshops, members of the OER communities frequently expressed concern about violating trademark law, and occasionally raised questions about patent law. In both cases, there is almost no overlap between the commercial activities that these bodies of law regulate and the educational domain of OER.

Trademark protects brand owners against a certain range of commercial misrepresentations. For example, it limits coffee companies other than Starbucks from using round, green, mermaid logos as their own and it can lead to litigation battles over “swoosh”-like markings on sneakers other than Nike. So it might be a mistake to use a variant on the name of a commercial textbook publisher to label an OER, even if it is done tongue-in-cheek. On the other hand, most conceivable uses of trademarks in OER cannot trigger concerns of that kind because they aren’t “uses in commerce” – designed to sell or promote or engage customers.

While Hollywood movies and reality TV may choose to avoid using unauthorized trademarks on screen, out of deference to the lively commerce in “product and brand placement,” depicting trademarked names and logos for illustration, critique, or description in learning materials are not the types of uses to which trademark applies.

Thus, OER makers should feel confident when:

- Describing places, objects, and experiences in the real world, or in an imagined one;
- Encouraging students to do the same, and publicly sharing or displaying that work;
- Discussing or evaluating history or current events;
- Including pictures that include trademarked names and logos, if otherwise permitted by copyright law;
- Using trademarks in the context of providing realistic examples or question prompts; or
- Directly examining marketing or branding

OER makers should avoid, when possible:

- Using trademarks in a way that might suggest sponsorship or branding on a cover of a resource, or in its naming or marketing;
- Choosing trademarks related to only a single brand, when creating new examples and hypotheticals; and
- Using visual marks for strictly decorative purposes unrelated to the pedagogical purposes of the OER.

## What About Patent Law?

Just as trademark law operates only in a narrow range of commercial practices, the same is true of patent

law – if you aren’t “practicing” a patented invention or directly encouraging others to do so, you are not operating within the area that patent law controls. Patent law controls the right to make, sell, or use an invention, not to depict, describe, or teach about it. The only theoretical risk would be liability if you were encouraging others to infringe a patent you know exists – a highly unlikely case in teaching materials. Furthermore, remedies would be available only if a patent owner suffered meaningful financial harm as a result, making it even harder to imagine how teaching materials could give rise to a patent suit.



# Best Practices in **FAIR USE** for OER