How Would You Teach if Copyright Wasn’t in the Way?

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Welcome and Overview
What we’ll cover:

- Why you need fair use materials *and* Creative Commons licensed material to create high quality open educational resources
- What the Code of Best Practices is and what principles were identified
- Discussion: How the Code support teaching foreign languages
The Public Domain, Creative Commons Licenses, Fair Use & Open Education
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Three legal provisions provide the basis for using materials in the creation of OER.

1. The Public Domain - Works out of copyright, and information not subject to copyright
2. CC licensed materials - provide broad use rights subject to some conditions
3. Fair use and other limitations and exceptions - legal rights to use copyrighted materials

In a few disciplines, it is possible to create OER with just the public domain and CC licensed materials.

In most cases, however, some use of copyrighted materials through fair use combined with CC licensed materials is the most effective way to achieve the pedagogical goal.

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Fair Use and The Power of Best Practices
Fair Use: Two Core Questions

1. Are you doing something new or different (something “transformative”) with the material?

AND

2. Is the amount you are using -- whether a part or the whole -- appropriate?

If yes to both, it’s unlikely that you’ll be providing a “substitute” for the copyright work in its intended market - which is the only pocketbook issue relevant to fair use.
The role of “Best Practices”

- Proliferation of Best Practices documents over the last 16 years
- Based on the pattern of two-way influence between the legal norms and community practice
- The missions of participating communities have benefitted -- doc films, libraries, etc.
- How can fair use best practices help OER?
- By promoting understanding and provide a framework for reasoning through fair use questions to robust, defensible conclusions.
- The aim, again: To assure the availability of a wide range of illustrations and examples to support teaching and learning -- not just those with open licenses or PD status
  - Media literacy and the misinformation crisis
  - Language learning based on real-world examples
  - Accessibility and durability of OER -- creating resources that are self-contained
What the Code Is, and What It Is Not
How to use the Code of Best Practices

[Note first two sections of document: “Applying the Code”]

● As a tool for institutional and individual copyright education
● As a guide to reasoning about how to apply fair use to particular projects, including in recurrent situations
● As a vehicle for talking about fair use with colleagues, including so-called “gatekeepers”
● As a way of attracting new makers to the OER project and enabling new projects
What the Code is not!

- Because it keeps a tight focus on fair use and inserts into OER, it doesn’t address fair use in course reserves, classroom work, etc.
  - Fortunately, other complementary Codes (including the ARL Code) help here.
- Because it addresses fair use, it isn’t a handbook on how to get the most out of open licensing.
  - Again, there are other resources to help with these questions
- Because it describes a way of thinking about fair use, it doesn’t provide metrics, rules of thumb, etc.
  - Just as well, since these have proven to be some of the most consistently mischievous features of the copyright knowledge system.
The Code: Principles
How the principles in the Code are structured

- Use case
- Statement of principle
- Considerations for use
- Hard cases - as an outer limit and reminder that this isn’t a get out of jail free card
Using inserts as objects of criticism and commentary

in spite of everything
which breathes and moves, since Doom
(with white longest hands
neatening each crease)
will smooth entirely our minds

—before leaving my room
i turn, and (stooping
through the morning) kiss
this pillow, dear
where our heads lived and were.
Principle - criticism and commentary

“Including inserts for critique and commentary represent non-controversial instances of fair use; if a textbook 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”
Considerations - criticism and commentary

1. Restricted to objects or source materials being directly examined and 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
3. Draw, where possible and appropriate, on a range of source works
4. Attribution consistent with generally prevailing standards in the discipline
Hard Cases - criticism and commentary

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. Projects of this type may require individualized legal guidance to evaluate specific cases.
Including inserts for the purpose of illustration

Images from *Metropolis* (1927) and *Star Wars* (1977) included on the basis of fair use as described in the Code of Best Practices in Fair Use for Open Education
Principle - using inserts for illustration

“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”
Considerations - using inserts for illustration

1. Be prepared to explain the **intended significance** of an illustrative insert in the context of the OER where it appears
2. Avoid uses that are exclusively or primarily **decorative** and do not substantially enrich the pedagogical purpose and narrative
3. Inclusions should be **quantitatively and qualitatively appropriate** in light of pedagogical relevance
4. 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. Some texts and images may be free to incorporate because they are subject to limits on copyright protection for **factual content**.
There are many ways in which visual, textual, or musical illustrations can support pedagogy, some quite literal and others more oblique. 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.
Incorporating content as learning resource materials

Poster for Brazilian telenovella *Malhacao* is included on the basis of fair use as described in the Code of Best Practices in Fair Use for Open Education
Principle - Incorporating Content

“Resource materials suited to the learning objectives of an OER may be incorporated in reliance on fair use”
Considerations - Incorporating Content

1. Include or reference newly authored contextual materials as required to make them accessible and available to students, and to direct students’ use of them, including glossaries, annotations, study questions, etc.

2. 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.

4. Materials should be derived directly from primary sources, rather than from versions that have been edited or simplified for educational purposes.

5. Materials incorporated in a particular OER should be derived from a range of sources, rather than from only a few.
Hard Cases - Incorporating Content

Although using items of “high value” contemporary popular culture is often permitted for purposes of critique or illustration, members of the OER community voiced there was 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.
Repurposing pedagogical content from existing educational materials

Verb Conjugation Chart and image of *Modern Nuclear Technology* included on the basis of fair use as described in the Code of Best Practices in Fair Use for Open Education
Principle - Repurposing educational content

“Fair use supports the selective incorporation of elements from sources which are not currently in wide use as course materials”
Considerations - Repurposing educational content

1. Begin with a consideration of what parts of the source material copyright actually protects; facts, subject matter, general organization, and broad choices about coverage are beyond the reach of copyright protection.

2. Use of short snippets of text from copyrighted sources may be permissible not just as fair use, but also as de minimis quotations.

3. Be prepared to explain the specific teaching or learning value of each incorporated item and why it represents the best choice.

4. Be prepared to explain why the OER does not function as a market substitute.

5. Diversify the range of source works.
Hard Cases - Repurposing educational content

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.
The Code: Appendices and Values
The Appendices -- well worth your attention!

1. A summary of **what the project team found about OER and copyright** in our conversations (starting in 2018-19) with leaders in the field

2. A **concise account of fair use law** in the U.S., including its history and the current state of the case law

3. A discussion of **copyright exceptions** that function similarly to fair use in **other countries of the world**

4. A specific illustration of the preceding point, focused on the **Canadian law of “fair dealing,”** prepared especially for the Best Practices by our friend and collaborator Professor Carys Craig.

5. A run-through of **other IP doctrines** that might limit OER making, reaching the happy conclusion that most of them actually don’t.

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Core values throughout the Code

- Attribution of sources and clear marking of fair use inclusions
- Fair use as a tool for equity
- Fair use as a tool for accessibility
- Linking out as an inadequate approach
What’s next

- Introduce the Code in webinars and conference
- Begin the real work: localization into specific communities and disciplines
- Contact us: https://form.jotform.com/210464937980060
Questions and Discussion