

Code of Best Practices in Fair Dealing for Open Educational Resources

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

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The material provided in this Code is for general information purposes only. It does not constitute legal advice. Content reflects best practices as of the date of publication and may be revised and updated as necessary.

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General

The *Code of Best Practices in Fair Dealing for Open Educational Resources: A Guide for Authors, Adapters & Adopters of Openly Licensed Teaching and Learning Materials in Canada* was adapted from its U.S. counterpart, the [Code of Best Practices in Fair Use for Open Educational Resources](#). The authors of the Canadian Code are indebted to the work of our U.S. colleagues and those who contributed to their process. While

the Canadian Code has adopted the formatting and style of the U.S. version and is similar in scope and purpose, significant changes were necessary in order to address the Canadian legislative and legal context. As a result, the Canadian version is more than an adaptation, it is a new work that owes its underlying context and inspiration to the U.S. version.

The Canadian Code benefited from the U.S. consultation process and has adopted the same general principles, considerations and use cases. However, new sections were written and some content from the U.S. version has been removed altogether. This is particularly notable in the *Behind the Code: Copyright Flexibilities and Fair Dealing in OER*, and in the Appendices. For example, *Appendix Three* of the U.S. Code, authored by Canadian legal scholar Dr. Carys Craig, now appears as *Appendix One* in the Canadian code. It has been updated to reflect recent developments in Canadian law and provides the underlying legal analysis for the Canadian version. *Appendix Three* of the Canadian code, which was written with assistance from Kayla Lar-Son, is a new work that addresses Indigenous knowledge and considerations for OER.

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Open Educational Resources and Fair Dealing

Open educational resources (OER) are openly licensed¹, freely distributed educational materials that advance a wide range of goals within the educational system. They enable flexible and open pedagogy, support equitable access to academic authorship, facilitate representation of different student experiences, and reduce the cost barriers associated with high-quality learning materials. Creators and adopters of OER are often motivated by a shared commitment to increase access to materials and to contribute to the common good.

If OER are to fully achieve their pedagogical, pragmatic, and social functions, OER creators must have the ability to responsibly incorporate and reference copyright-protected works. They must not be constrained to only what commercial publishers choose to offer and the formats they choose to offer it in, nor should obtaining permission or a licence be the only consideration when it comes to the allowable use of content that has a clear pedagogical goal.

For many OER creators, however, a lack of familiarity with copyright law and its application can result in uncertainty, and even anxiety, when it comes to incorporating third-party materials into their work. Commonly referred to as *copyright chill*, this is further exacerbated for OER authors who do not have access to specialized copyright support to assist them with questions as they arise, and for whom the prospect of doing their own copyright research may be daunting. Time pressures may also contribute to the reluctance to tackle copyright related questions, and as a result, they may decide to avoid the use of any copyright-protected materials in their OER. This may result in a reliance on Creative Commons or other openly licensed content, which may be adequate but less than ideal in terms of the pedagogical objectives of the OER. In many cases, a creator may need to examine,

¹ This document makes a distinction between openly licensed works and other types of copyright-protected materials. Copyright-protected works in the context of this document means works that are not openly licensed and all rights are reserved by the copyright owner. Openly licensed materials are still protected by copyright but allow the creator to grant advanced permission to others for certain uses. For example, end users can use, share, or adapt an openly licensed work according to the terms of some Creative Commons licences.

critique, or analyze a specific work, and only by including relevant portions of that work can the examination be effective.

Fortunately, it is possible for OER creators to make judicious and legally defensible decisions about the content they wish to use in their work. Canada's copyright law is structured to balance the rights of copyright owners with those of the users of copyright-protected works; as such it contains numerous exceptions to enable a range of permissible uses. In particular, the fair dealing exception provides a broad and flexible user right intended to facilitate the use of copyrighted materials for purposes such as education, private study, research, criticism, and review – all purposes which are relevant to the creation of an OER. Judicial decisions over the past two decades have provided much clarity with respect to the application of fair dealing principles, particularly in educational contexts. Furthermore, most educational institutions in Canada have adopted fair dealing policies or guidelines which provide sound guidance on using copyright-protected works fairly for educational purposes.

The Canadian Context

This Code, adapted from its U.S. counterpart, the [Code of Best Practices in Fair Use for Open Educational Resources](#) (U.S. Code), explores the legal and practical application of fair dealing in the context of OER creation in Canada. While there are similarities, in both purpose and scope, between the U.S. fair use exception and Canadian fair dealing, the two doctrines are not identical. By providing Canadian legislative and legal context and relevant practical examples, this adaptation provides an effective model for the application of fair dealing to OER in Canada. Generally, fair dealing guidelines used at Canadian educational institutions are intended to apply to instructional scenarios in which the audience is limited. However, the fair dealing exception in the *Copyright Act* is relevant to a broader range of use cases. This Code describes clear, well documented, and reliable ways to evaluate fair dealing specifically in the context of OER creation. It draws extensively on Appendix Three of the original U.S. Code, written by Canadian legal scholar, Dr. Carys Craig, to whom we are indebted. The Canadian version has also benefited from the in-depth and robust consultation process undertaken by the authors of the U.S. Code. Our hope is that this Code will empower Canadian creators and adopters of OER to make use of fair dealing, while also fostering institutional and legal support for doing so.

The benefits of incorporating selections of third-party copyrighted material - what we call *inserts* in this document - into an OER are significant. The ability to draw on a wide range of relevant resources, regardless of their copyright status, ensures the development of high-quality educational resources that effectively meet the specific learning objectives identified by their creators. When compared to their commercial counterparts, these quality resources are easier to keep accurate and up to date and more likely to be widely adopted and adapted by other educators, thereby positively impacting greater numbers of students. The use of OER in preference to commercial educational resources removes significant barriers to access for students while fostering a superior learning experience. Not only are students provided with immediate, affordable access to the learning materials they require, but those materials can be tailored to address specific course objectives, teaching approaches, or contexts, and to ensure access and suitability for diverse audiences, including students with disabilities and those from marginalized communities.

This Code will support practitioners in making reasoned decisions when incorporating copyright-protected works into OER creations. It is intended to facilitate discussion and a deeper understanding of the fair dealing right as it relates to OER in Canada. The Code is a practical guide that will complement institutional copyright policies, procedures, and resources. It is a tool to assist OER creators and adapters with making informed assessments regarding the use of copyright-protected works in OERs. Users of the Code should also consult with institutional copyright offices or experts, if available, as needed.

Open Educational Resources, Inserts, and Universal Access

Consistent with the U.S. Code, this Canadian adaptation uses the term *inserts* to identify an excerpt of protected work from a third-party source that educators may wish to incorporate into an OER. For example, inserts could include an image, figure, text excerpts, video, or audio clip.

In developing the U.S. Code, the authors consulted with a broad cross-section of OER professionals (authors, advisers, librarians, instructional designers, publishers, network organizers, adopters, and more), who collectively made the following observations with respect to the use of inserts:

- the strategic use of inserts 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;
- concerns about copyright compliance may lead OER makers to feel constrained to use only Creative Commons-licensed inserts in their works. 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 may also limit OER makers' use of inserts altogether, driving practices such as linking out to sources rather than incorporating them. This reduces the effectiveness and durability of OER and poses particular risks to students with disabilities and students who face other access barriers.

OER and Accessibility

The open education community is generally committed to principles of accessibility and strives to ensure OER are accessible to learners with varying backgrounds, circumstances, and abilities. However, OER creators may unwittingly undermine the accessibility of their work in an effort to stay within the limitations of fair dealing. For example, they may decide to simply reference, or provide a link to, a third-party resource rather than incorporating the desired material directly into the OER, because they perceive linking as being safer, even if it is less reliable and less pedagogically satisfactory. Besides the obvious practical reasons to prefer incorporating inserts over linking to them - links can break or change, sometimes they take students to unintended places, and they are not usable in an offline environment - there are principled ones as well. Making OER accessible to students with perceptual disabilities is both a necessity and a pedagogical opportunity, and it is not adequately met by reliance on linking.

Educational institutions in Canada have ethical and sometimes legal obligations to make resources universally accessible to their communities. 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. Fair dealing supports educational institutions in realizing their accessibility commitments and fulfilling their broader pedagogical goals. While there may sometimes be good prudential reasons for OER makers to

forgo exercising their fair dealing right, the benefits of risk avoidance must be weighed against the potential costs. Understanding the scope and flexibility that the fair dealing exception offers can help with the risk-benefit analysis and ensure the fulfillment of the author's core mission - making the best possible OER available to the broadest range of learners.

Behind the Code: Copyright Flexibilities and Fair Dealing in OER

Before beginning a fair dealing assessment, it is important to first consider the numerous copyright flexibilities that favour broad dissemination of information. Among them is the idea/expression distinction which has the effect of assuring that ideas (i.e., the facts, theories, and concepts embodied in copyrighted materials) are always available for reuse. Similarly, content that is in the public domain, either because its copyright has expired, because it does not warrant copyright protection, or because the creator has opted to dedicate their work to the public domain, is generally free for an OER creator to use from a copyright perspective. Also, free to use are small portions of a work which are insubstantial (in amount and significance) when considered in relation to the rest of the work and which therefore do not require a fair dealing assessment. For example, depending on their quantity or quality, very short snippets or quotes from protected material may be considered insubstantial. Appendix Two of this Code provides additional detail about types of content that may not be subject to copyright protection and are therefore available for re-use without needing to consider fair dealing.

However, if other copyright flexibilities have been considered and rejected, conducting a fair dealing assessment will allow an OER creator to evaluate if their use of an insert is "fair". The following information serves as a practical guide to assessing fair dealing for inserts in the OER context. For a more thorough explanation of fair dealing, including important details about its history and evolution in the Canadian context, see Appendix One.

Fair Dealing in Canada

User Rights, of which fair dealing is the most expansive, are an integral part of copyright law in Canada. The fair dealing exception in the Canadian *Copyright Act* allows creators a limited right to copy and communicate protected works without permission or payment, if certain qualifying factors are met. The courts have

identified two steps when evaluating whether the use of a work might be considered fair dealing:

Step 1:

The purpose for using the work must be for one of the eight fair dealing purposes specified in the Copyright Act: research, private study, education, parody, satire, criticism, review, or news reporting. In step one, the purposes are to be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained.

Step 2:

The use of the copied material must also be fair. The courts have introduced and consistently applied several factors as a framework for assessing whether a dealing was fair. These factors include: why the copy was used, how widely the copy is being made available, the amount of the work being copied, the nature of the original work, whether there was any reasonable alternative to copying the work, and the impact of the copying on the market for the original work.

Most material that is inserted into an OER - to further a pedagogical purpose, not merely as a decorative or entertaining addition - will fall under one of the allowable fair dealing purposes listed in Step 1 above, such as education, private study, criticism, or review.

However, Step 2 of the fair dealing assessment requires that the user also evaluate whether their specific use is fair. While the Supreme Court of Canada has established that the threshold for the first step is relatively low, it is the second step where the rigorous fair dealing analysis takes place. The Supreme Court of Canada has identified the following six factors in the second step to determine whether or not the dealing is fair.

The six factors are:

- 1. The purpose for making the copy.** Having addressed the broad purpose in step one, this factor examines the user's real purpose or motive in reproducing or distributing a work. Works created for non-commercial purposes are generally likely to be more fair. When determining the purpose, the predominant perspective is that of the end user (e.g., the student, in the case of an OER). The copier's purpose is not irrelevant, but the maker of an OER is

unlikely to have a separate purpose or ulterior motive that makes the dealing unfair.

- 2. The character of the copying.** This factor reviews the intended use of the work. Generally, a single, one-off copy is more likely to be fair than multiple and/or widely distributed copies. This factor will almost always tend towards unfairness in the OER context as discussed below.
- 3. The amount of work that will be copied.** This factor assesses the amount or proportion of the work used in relation to the purpose of the use. A small portion tends to be more fair than a large portion of a work. No more of the work should be used than is reasonably necessary to achieve the purpose of the dealing.
- 4. Whether there are alternatives to copying.** Copying of a work is more likely to be fair if there are no reasonable alternatives to doing so. When copying content for inclusion in an OER, carefully curated selections used for pedagogical purposes will tend towards fairness. If the pedagogical point could have been made effectively without using the copyright-protected work, this will tend towards unfairness. Additionally, it is not necessary to acquire a work that is available under a licence or subscription as an alternative to copying the work.
- 5. The nature of the work being copied.** This factor examines the type of work being copied. Copying works that are not confidential or were intended to be widely shared is more likely to be fair.
- 6. The effect of the copying on the market for the original work.** This factor assesses any impact the copying may have on the commercial market for the original work. Copying will tend to be fair if it has no detrimental impact on sales of the original.

It is important to work through all six factors when determining if fair dealing enables the inclusion of a selected insert in an OER. And it is critical to note that not all factors may apply nor be equally weighted with respect to each insert's use case. Some factors may be neutral, neither fair nor unfair, while others will clearly tip the balance. For example, as noted in the description of the six factors above, the character of the copying in the context of OER will almost always tend towards unfairness. This is because in order to achieve the underlying objective of making OER available without restriction, wide distribution is not only inevitable but pursued. Conversely, the

purpose factor should consistently tend towards fairness because the inclusion of inserts in the interests of furthering a pedagogical goal will easily fall within the fair dealing purposes of criticism, review, education, or private study. The Code section below covers four *Principles* that reflect best practices when applying fair dealing to inserts selected for inclusion in an OER. The Principles were originally identified in the U.S. Code consultation process but are equally relevant to the Canadian OER environment.

Applying This Code

The Code discusses the possible application of fair dealing in common scenarios that will arise as open education practitioners author, adapt, and adopt OER. It identifies four use cases, based on the nature of the work from which an insert is drawn, as well as the pedagogical purpose for which the insert is being used, and outlines the basis upon which fair dealing may enable the use in each case.

Each of the sections of this Code has been adapted from the U.S. version of the Code to reflect best practices in the context of Canadian law. Each scenario, or section of the Code, is organized under the following headings:

Description: provides details about the type of insert, the purpose for including it in the OER, its function with respect to the pedagogical goals of the OER, and relevant examples.

Principle: evaluates the availability of fair dealing to enable the lawful use of the described inserts, based on the outcome of a fair dealing assessment. A brief explanation of the fair dealing factors most applicable to this scenario, as well as how to assess them, is included. The Principle reflects best practices identified by the OER community when assessing the fairness of a use in relevant scenarios, and is subject to important considerations.

Considerations: lists important contextual factors that are integral to the application of fair dealing as described in the Principle. These considerations provide additional detail and nuance that may help a practitioner ensure their use is in keeping with fair dealing principles.

Challenging Cases: provides examples of one or more use cases which may require special attention when evaluating fair dealing or which may not fit clearly within established fair dealing best practices.

The Code does not describe all situations in which fair dealing might be available to the OER community. Likewise, some inserts can be analyzed under more than one of the Code's use cases, and inserts that are included in OER may serve multiple teaching purposes. The Code's Principles and Considerations are also subject to interpretation, and it is expected that members of the OER community will apply and adapt the approaches outlined in the Code to new situations as they arise.

Technological protection measures or *digital locks*, as they are commonly known, are software or mechanisms by which copyright owners restrict access. They must not be circumvented or broken in order to access and incorporate content into an OER under fair dealing. For example, watermarks may not be removed from images, and it is not permitted to rip copy protected DVDs in order to reproduce the content.

Moreover, works that are made available behind a paywall or via personal subscription services such as Netflix, Disney+, copies of electronic textbooks, or even institutionally licensed journal and eBook content, will have terms and conditions that apply to their use. It is important that OER creators review the terms of use for any subscription-based or licensed materials that they intend to include in an OER because they may prohibit uses that are allowable under fair dealing.

The Canadian *Copyright Act* requires that the original source be mentioned when fair dealing is applied for the purposes of criticism, review, and news reporting. Also, if given in the source, the name of the author should be mentioned. While attribution is not a requirement for every fair dealing purpose, academic best practices support the inclusion of an acknowledgement when using third-party content in a work. Beyond professional standards, clear referencing of inserts in OER serves to eliminate ambiguity for other educators who may subsequently adapt or repurpose the work.²

² Attribution is a legal requirement to acknowledge a creator and is only required for specific use cases as outlined in the Copyright Act, or given the terms of a licensing agreement. Citation practices, while also used to identify authorship, are a matter of academic integrity and are employed in academic and research publications to signal the inclusion of third-party

Canadian law also grants moral rights protection to creators. Authors have the right to protect their reputation as well as the integrity of their work. They also have the right to be associated with the work as its author, or to use a pseudonym, or remain anonymous. These rights last for the duration of the term of copyright. Notably, fair dealing is not a defence to an infringement of moral rights. Within the context of OER creation, providing attribution for inserts in accordance with the best practices set out in this Code will be unlikely to result in any moral rights violation. And 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,” this right is violated only if such use is “to the prejudice of its author’s honour or reputation.”³

This Code uses practical examples to apply a fair dealing analysis to materials both familiar and emergent. The Principles should serve to encourage constructive discussion with colleagues and support established institutional and other applicable copyright guidelines or collective agreements. It is not the intention of the Code to create rules of thumb, bright-line rules, or other decontextualized decision-making shortcuts such as percentages of a work or word count that is permissible to include. Rather it emphasizes the importance of the OER author’s professional judgement in assessing the fairness of a use in relation to the pedagogical goals of the OER. Finally, just as this Code is not exhaustive, it is also not mandatory since authors and institutions may choose not to claim the full scope of their fair dealing rights for varying reasons. However, it is useful and important to know what those rights are before any risk management decisions are made.

ideas and material. Generally, all academic citation style guides will meet attribution requirements.

³ *Copyright Act*, RSC 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 CPR (2d) 105 (Ont. H.C.); *Prise de Parole Inc. v. Guérin, éditeur Ltée* (1995) 66 PRR (3d) 257 (FCTD).

THE CODE: Principles, Considerations, and Challenging Cases

A. USING INSERTS AS OBJECTS OF CRITICISM AND REVIEW

DESCRIPTION

As with all textbooks and educational materials, OER depend on the inclusion of third-party content to enable analysis, critique, and review. A textbook surveying modern poetry will be more effective if its arguments about stylistic trends are supported by discussions of specific poems included for this purpose. A film studies course seeking to develop close analysis skills will benefit from examining the construction of film clips from actual motion pictures. And media literacy students require access to real-world ads in order to master the skills needed to assess the accuracy of the claims of political advertising. Similar examples can be drawn for all academic fields, including social sciences and STEM subjects. Whether the critique is modeled by the OER author, or engaged in by the students, the ability to select copyright-protected inserts and include them as objects of criticism and review ensures that OER can achieve their maximal value.

PRINCIPLE

Including inserts for the purpose of criticism or review will almost always fall within the scope of the fair dealing exception, given that these two purposes are explicitly enumerated in the *Copyright Act*. Furthermore, as such inserts are specifically selected as objects of critique or review, there is arguably no reasonable pedagogical alternative to including them in the OER.

Once the general purpose of criticism or review has been established, an OER author must still evaluate whether the use of the insert falls within the bounds of fairness. In doing so, the assessment will need to focus on the following fair dealing factors: the specific purpose of the use, the amount of the original work being copied, the availability of any reasonable alternatives to the use, and the impact the use of the inserts may have on the market for the original work.

The amount of a work that comprises the insert should always be appropriate in relation to the pedagogical purpose that it serves. Using an entire poem or illustration

may be justified, if it is reasonably necessary in order to perform the intended analysis or critique. But in other cases, only a representative portion of a work, such as a movie clip or excerpt of text, may be required in order to fulfill the pedagogical purpose.

Determining if there are alternatives to the use of a particular insert will also be important in assessing the fairness of the use. If there is an openly licensed or free-to-use⁴ alternative that fulfills the same pedagogical purpose and enables the same depth of critical analysis and review, the use of a protected insert is less likely to be fair. However, if an OER is addressing a specific text, image, or other object directly – or inviting readers to do so – there is often no equivalent pedagogical alternative to including that item.

Lastly, OER authors will need to evaluate whether the inclusion of an insert may have a detrimental effect, such as diminishing the sales of the original work. While an OER may be in direct competition with other commercial works (such as textbooks), the inserts included for the purpose of criticism and review are unlikely themselves to impact the value of the original work (e.g., the poem, or film from which a clip has been taken).

In conclusion, fair dealing can enable the use of inserts for the purpose of criticism and review based on evaluation of the factors described above, and subject to the following additional considerations:

CONSIDERATIONS

1. Applying fair dealing to inserts for this purpose should generally be restricted to objects or source materials that are being directly examined. When inserts are included to facilitate students practicing critical skills, the OER should include guidance, such as annotations or reflection questions, to demonstrate an objective pedagogical purpose.
2. The inclusion of an insert under fair dealing should be quantitatively and qualitatively appropriate. In each instance, consider the scope of the commentary or analysis: fair dealing may justify including an entire work such

⁴ This document defines free-to-use materials as those that have no copyright protection or are licensed in such a way that they enable the intended use in the OER.

as a poem if the work in its entirety is being critiqued, but not an entire feature-length film if only a portion is being examined.

3. OER authors should consider drawing on a range of source works. The inclusion of inserts from multiple sources is likely to be fair so long as each insert is limited to the amount necessary for the purpose at hand.
4. Attribution must be provided for all inserts included for the purpose of criticism and review. While attribution should generally be consistent with the prevailing standards of the discipline, the *Copyright Act* specifies that the work's source and creator (author, performer, maker, or broadcaster) must be mentioned when relying on fair dealing for criticism or review. Ethical attribution practice also provides students with a good model for their own use and is essential for future OER adaptation of the work.

CHALLENGING CASES

The use case above contemplates potentially including whole works as inserts, which may lead to an OER containing a number of entire protected works. While the fair dealing analysis discussed above applies to each individual protected work, questions remain as to when and how fair dealing can be employed to create a freestanding OER anthology or collection of protected works. For example, while a selection of poems for use in contemporary literature courses might be permissible according to the Principle and Considerations discussed above, the assessment would (among other factors) depend heavily on how much critical context the collection includes. Projects of this type require discussion with someone who has appropriate copyright expertise to evaluate the advisability of relying on fair dealing or whether permission should be sought.

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 Canadian labour 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 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 of inserts are common 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 dealing supports the incorporation of thoughtfully selected inserts in all subject matter areas, derived from a full range of sources and media.

While illustration itself is not one of the enumerated fair dealing purposes in the *Copyright Act*, the pedagogical purpose served by including inserts for illustration is aligned with several fair dealing purposes, including research, private study, and education. The next step is to ensure that the use is fair. For illustrative inserts, the critical factors to assess include the real purpose and motive for the use, the amount of the original work being copied, available alternatives to using the selected inserts, and the impact the use of the inserts may have on the market for the original work.

When selecting inserts for the purpose of illustration, the value of the inserts is often derived from their breadth and variety. OER authors should consider the amount they copy from any one source and only use the amount necessary to fulfill the illustrative purpose. Selected materials should also avoid unnecessary repetition or redundancy.

Because inserts for the purpose of illustration often come from materials that were not created with an educational purpose in mind, it may be important to consider whether the use of the work impacts the market for the original work. An author should avoid using a copyright-protected work when an open or free-to-use alternative is available and would serve the same illustrative purpose.

In addition to assessing the fair dealing factors described above, OER authors using inserts for the purpose of illustration will also need to take into account the following considerations:

CONSIDERATIONS

1. OER creators 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, its relationship to the text, or the characteristics of the insert itself.
2. Likewise, creators 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 should be quantitatively and qualitatively appropriate in light of its pedagogical relevance; thus, a thoughtful analysis might justify including an entire photograph, but only a selected segment of a motion picture.
4. Authors should avoid copying multiple inserts from a single source unless there is a clear pedagogical motivation for doing so.
5. Attribution should be provided for illustrative inserts, and should generally be consistent with the prevailing standards of the discipline.

CHALLENGING CASES

It is clear that there are many ways in which visual, textual, or musical illustrations can support OER pedagogy, some quite literal and others more oblique. Thus, the use of epigraphs is a well-established fair dealing practice, but introducing chapters in a history text with photos of adorable (but unrelated) photographs of baby animals is unlikely to be fair. And practices that might be acceptable in a classroom setting, with a limited audience (such as the use of topical cartoons to begin a class period) may be harder to justify in an OER context in which the work is made widely available publicly. The question that persists is how persuasive an argument can be made that the insert in question is serving (even indirectly) an identifiable and genuine pedagogical purpose. Seeking permission may be an appropriate option in these cases.

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 an introductory French 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 essays. 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 but promoting mastery of the subject matter. Supplying students with essential opportunities to practice their skills and deepen their insights is crucial to the practice of education. Sometimes the materials chosen for this purpose are ephemeral in nature, and sometimes they possess more enduring value; however, in many cases these materials were created for purposes other than educational use. They are often materials that students would not otherwise have encountered, and they should always be contextualized to enhance their value as learning resources.

PRINCIPLE

Fair dealing can enable the inclusion of a wide range of resource materials in an OER that were created for purposes other than educational use, provided their inclusion supports the learning objectives of the OER.

Although the selected resource materials may not have been created with an audience of learners in mind, incorporating them into an OER to further an educational objective will in most cases align with one or more of the fair dealing purposes. Such inserts may be included to facilitate criticism, review, education, research, or private study. Once the purpose of the use has been established, an

OER author must then also evaluate whether the use of the insert in this context is “fair”.

When assessing whether their use is fair dealing, it will be important to identify a genuine pedagogical purpose as opposed to, for example, mere entertainment or enjoyment of the source material. OER authors will need to consider the amount they copy from any one source and only use the amount necessary to fulfill the illustrative purpose.

Because these kinds of resource materials are generally not created with an educational purpose in mind, it will be important to also think about whether the use of the work may impact the market for the original. This is more likely to be the case when the use involves major portions of the source work, such that the use could impinge on the market for the original. In such cases, it may be worth determining whether there is an open or free-to-use alternative that might serve the same learning objective.

In addition to assessing the fair dealing factors described above, OER authors using inserts as learning resource materials will also need to take into account the following considerations:

CONSIDERATIONS

1. Resource materials incorporated on the basis of fair dealing 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 contemporary or 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 dealing should be quantitatively and qualitatively appropriate. In some cases for example, fair dealing might justify incorporating an entire short article that is needed for a student reflection or response, but not a longer text when students are only expected to engage with a portion of the work.
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. The rationale for this is, if you're copying from edited or simplified works, you should also consider the rights of the party that performed the editing/simplification.

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 always be provided for fair dealing inserts and should be consistent with the prevailing standards of the discipline.

CHALLENGING CASES

Although using items from contemporary popular culture is often permitted for purposes of critique or illustration, members of the OER community may have hesitation about using them in their entirety (music videos for example) as resource materials for a more generalized educational purpose. This concern may stem in part from a perception that these high-profile inclusions are more likely to be challenged, and that it might be difficult to enunciate the pedagogical considerations which were predominant in their selection. In such cases it may be preferable to link to the content (though this may require other considerations) or seek permission from the copyright holder. When considering including inserts from works of contemporary culture in an OER, consultation with someone who has appropriate copyright expertise is recommended.

D. REPURPOSING PEDAGOGICAL CONTENT FROM EXISTING EDUCATIONAL MATERIALS

DESCRIPTION

OER authors may sometimes find that existing educational materials, such as commercial textbooks, study guides or educational videos, contain relevant content that is ideal for inclusion in their OER. In such instances, it may not make sense for authors to substitute openly licensed alternatives or to reinvent the required content themselves. For example, a figure from an older edition of a biology textbook may be the most appropriate illustration of a particular concept to include in an OER on the same subject. Or, instead of recreating a quiz question, it may make sense for an author to use a relevant question from an existing study

guide. Fortunately, fair dealing can often enable the use of such inserts, subject to a number of considerations.

PRINCIPLE

Fair dealing can support the selective incorporation of elements from existing educational resources that are no longer in current use or commercially viable.

Inserts taken from existing educational materials such as textbooks, study guides, or educational videos will almost always be selected to further a pedagogical objective, and as such, will fall under one of the broad fair dealing purposes, whether criticism, review, education, research, or private study. But an OER author must also evaluate whether the use of the insert in this context is “fair”.

In the examples provided in the Description above, the content being used is likely to be a small amount when considered as a portion of the entire work. Some inserts may represent such a small portion of the original work as to be insubstantial, in which case, use can proceed without the need for a fair dealing analysis. For more substantial portions, it will be necessary to determine whether the amount used is fair, from both a quantitative and qualitative perspective, in relation to the purpose. Reproducing chapter summaries from a textbook, for example, may not seem like a large portion of the textbook based on word count, but could represent a core component of the book when considered from a qualitative viewpoint.

A fair dealing assessment must also take into account any reasonable alternatives to using the work in question. If an equally relevant insert could be used from a public domain work, or if the use of the insert did not really further the pedagogical goals of the new OER, this might weigh against a finding of fairness. Authors who are carefully selecting inserts from existing educational materials to support the pedagogical objectives of their OER can readily make the case that their choice of insert was deliberate, and that no alternative would have been suitable or equally effective.

Perhaps the most challenging of the fair dealing factors to assess in this scenario, however, is the impact of the use on the market for the original. It is likely when drawing on current educational works that those works may be intended for exactly the same market. As such, the use of inserts from these works could be seen to have a detrimental impact on the current sales of the original. However, there are many

potential source works created for educational purposes that have outlived their useful commercial lives but remain protected under copyright law. When assessing the effect of the use on the market for the work, use of content from out-of-commerce works is more likely to be viewed as neutral or tending toward fairness.

In addition to assessing the fair dealing factors described above, using inserts from existing educational materials also requires careful consideration of the following:

CONSIDERATIONS

1. Fair dealing analysis should begin with an assessment of what parts of the source material copyright actually protects; there are many types of factual information not protected by copyright, as discussed further in *Appendix Two*.
2. As previously explained, copyright flexibilities mean that 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 dealing analysis.
3. Likewise, creators of OER should recognize that the use of short snippets of text from copyrighted sources may be permissible simply because they are not substantial enough to warrant copyright protection, or to warrant a fair dealing evaluation.
4. If relying on fair dealing 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 creator should be prepared to explain why their insert 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 market than the OER).
6. When possible and as pedagogically appropriate, OER authors incorporating inserts from educational materials should select those inserts from a diverse range of source works rather than drawing on a single work.

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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.

CHALLENGING CASES

This Principle reflects the fact that uses of content from educational works that support the pedagogical objectives of the OER can be permitted under the fair dealing exception – provided that they don't undercut the market for the original. When inserts are drawn from popular, current works that are in widespread use in the education sector, it may be difficult to make a case that their use is fair dealing, particularly if the material is electronic and subject to licensing terms. In these cases, it may be advisable to seek permission (which may require negotiating a licence) from the copyright owner, to permit the incorporation of elements from such materials into the new OER.

Acknowledging Fair Dealing

The OER community is characterized by its commitment to assuring that adoption and adaptation of an existing OER should be as straightforward and transparent as possible. As a result, members of that community have emphasized that when inserts in materials are included in reliance on fair dealing, a clear acknowledgement of this fact would be a best practice.

In Canada, when using material for some fair dealing purposes, namely criticism, review, and news reporting, attribution is actually a legislated requirement. Canada's *Copyright Act* mandates that the source, as well as the creator (author, performer, maker, or broadcaster) of a work must be acknowledged in order for a use to be considered fair dealing for these purposes. While this is not a statutory requirement for fair dealing for educational purposes, attribution of the source material should be standard practice when inserts are included in any scholarly works, including OER. In addition to respecting the individual rights of authors and users, acknowledgement that material has been used on the basis of fair dealing is also important for the OER community. As OER are intentionally created with a view to being shared, adapted, and repurposed by future authors, signalling fair dealing provides clarity and certainty for those contemplating adaptations of the OER.

Based on current OER community best practices, direct acknowledgement of each insert included under fair dealing is recommended. This requires labelling inserts included on the basis of fair dealing with a short narrative text that includes the citation to the original work, as well as a fair dealing acknowledgement:

This illustration, from [SOURCE] is included on the basis of fair dealing.

In order to signal to downstream adopters and adaptors of their work the terms under which the content is permitted to be reused, OER authors will assign an open licence, such as a Creative Commons licence, to the completed OER. It is essential that the licence statement for the OER also identifies when individual inserts within the OER may be licensed differently or used on the basis of fair dealing. An example of a licence statement that acknowledges the inclusion of such material (and its exclusion from the OER licence terms) might be:

This work is licensed under a CC BY-NC licence with the exception of content explicitly labeled otherwise.

While it is often useful for authors to maintain their own records of their fair dealing reasoning, it is not generally necessary to communicate this in the OER itself, beyond clearly indicating which materials were original, and which were incorporated from third-party sources. An interested adopter or adapter could request additional information from the maker of the OER materials.

Appendix One: Fair Dealing in Canada – History and Evolution

The Beginnings of Fair Dealing

The history of fair dealing can be traced back to 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 1911⁵ and in Canada ten years later.⁶ The statutory fair dealing provisions 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 the 20th century explains the general perception that Canadian fair dealing is more limited than its open-ended U.S. counterpart, fair use, which continued to evolve without being statutorily restricted to specific purposes.

Fair Dealing as a User Right

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*.⁷ 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

⁵ *Copyright Act*, 1911, s 2(1)(i).

⁶ *Copyright Act*, 1921, s 16.

⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*].

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.”⁸

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.”⁹ 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.¹⁰

Importantly, the Court also set out factors for consideration in assessing the fairness of a use: “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.”¹¹

The Copyright Pentalogy

Another important development in Canada’s fair dealing doctrine was the collection of cases dubbed the “Copyright Pentalogy”: five rulings issued by the Supreme Court of Canada in 2012.

Most notably for OER makers, in the *Alberta (Education) v. Access Copyright*¹² 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.”¹³ 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

⁸ *Ibid* at para 48.

⁹ *Ibid* at para 51.

¹⁰ *Ibid* at para 63.

¹¹ *Ibid* at para 53.

¹² *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345.

¹³ *Ibid* at para 27.

engaging in research or private study.”¹⁴ 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*,¹⁵ 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.”¹⁶

These cases reinforced the lessons from *CCH*: Canada’s statutory fair dealing purposes should be liberally construed; facilitating an end-user’s (e.g., student) fair dealing can bring the copier (e.g., OER creator) within the scope of the relevant purpose; and most 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.”¹⁷

¹⁴ *Ibid* at para 23.

¹⁵ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [*SOCAM*].

¹⁶ *Ibid* at para 27.

¹⁷ *Ibid* at para 11.

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.”¹⁸

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, as well as new exceptions for educational institutions. The potential applicability of some of these exceptions to OER creations is discussed in *Appendix Two*.

Reaffirming Fair Dealing in Higher Education

At the time of writing, the most recent Supreme Court case impacting the use of fair dealing in an educational setting was *York University v. Canadian Copyright Licensing Agency (Access Copyright)*.¹⁹ Although primarily concerning the notion of tariff enforceability, in their unanimous verdict, Justice Abella noted that lower courts erred in their fair dealing analysis of copying for the purpose of sharing materials with students by “leaving out the perspective of the students who use the materials.”²⁰ Abella confirmed that “The purpose of copying conducted by university teachers for student use is for the student’s education.”²¹ Additionally, the Supreme Court found

¹⁸ *Copyright Act*, RSC 1985, c C-42, s 29.

¹⁹ *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 [York].

²⁰ *Ibid* at para 98.

²¹ *Ibid* at para 103.

that the lower court erred by considering aggregate amount of copying instead of the copying made on each student's behalf:

[T]he trial judge's criticism of York's Guidelines on the basis that different portions of a single work could be distributed to different students, such that an author's entire work could end up being distributed in the aggregate, is also contradicted by SOCAN, which held that "[s]ince fair dealing is a 'user's' right, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate."²²

The decision reaffirms that the Supreme Court remains strongly supportive of users' rights and serves as encouragement to users that the law in Canada continues to promote a large and liberal interpretation of fair dealing. More specifically, in the educational context, the *York University* case expressly confirms that students have a "right to receive course material for educational purposes in a fair manner."²³ Institutional and instructional practices that actualize this right (including the making and distribution of copies as educational resources) are therefore "consistent with the underlying balance between users' rights and creators' rights in the *Act*."²⁴

Two-Step Test for Determining Fair Dealing

CCH Ltd. v. Law Society of Upper Canada set out a two-step test to help users make fair dealing determinations. The first step was to confirm that the dealing was for one of the enumerated fair dealing purposes set out in the *Copyright Act*, which include research, private study, education, parody, satire, criticism, review, or news reporting. Only if a use falls into one of these purposes may a user proceed onto the second step of the test, which sets out a list of six factors to consider when determining the fairness of any potential use case:

1. The purpose of the dealing
2. The character of the dealing
3. The amount of the dealing

²² *Ibid* at para 104.

²³ *Ibid* at para 106.

²⁴ *Ibid* at para 106.

4. The nature of the work
5. Available alternatives to the dealing
6. The effect of the dealing on the work

Importantly, when relying on these factors to make a fair dealing determination, the court in *CCH* notes that not all considerations will arise in every case of fair dealing, but that they should be considered to provide a “useful analytical framework to govern determinations of fairness.”²⁵ Additionally, in several copyright cases, the Supreme Court has demonstrated the importance of considering all relevant factors, clarifying that fairness determinations should be made on balance of the fairness of each factor assessed in combination. Individual factors are not generally understood to be determinative of fairness but nor is the assessment simply a matter of calculating how many factors weigh for or against fairness. Rather, the multifactorial test is meant to guide a holistic assessment of the fairness of the dealing in the relevant circumstances.

Purpose

The Court has clarified on several occasions (*SOCAN, Alberta (Education), York*) that as a users’ right, it is appropriate to view the fair dealing purpose from the perspective of the end user regardless of whether that end user is the person making the copies. In cases of copying undertaken by teachers on behalf of their students, the Court has further clarified that there is typically no separate purpose on the part of a teacher: “When teaching staff at a university make copies for their students’ education, they are not “hid[ing] behind the shield of the user’s allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair.”²⁶

Much like the first step, this factor in the fairness analysis considers the purpose of the dealing. However, the stage two purpose involves a more nuanced and considered analysis of the fairness of the use in light of the real purpose and genuine motivations of the user. An ulterior commercial or time-saving motive, for example, may weigh against fair dealing while a genuine pedagogical purpose will weigh in its favour.

²⁵ *CCH*, *supra* note 4 at para 53.

²⁶ *York*, *supra* note 16 at para 102.

Character

As set out in *CCH*, the character of the dealing primarily examines how works are dealt with. Considerations include, for example, the aggregate number of copies made, the scale of distribution, whether or not copies are destroyed after use, etc.²⁷ In the educational context, this factor is often invoked to consider the total number of copies of a work made by an instructor or institution on behalf of students and how the copies were distributed. It would typically weigh in favour of fairness, for example, if a copy is posted on a site accessible only to enrolled students for the duration of a course.

In *SOCAN*, and later reiterated in *York*, the Supreme Court cautioned against assuming that “large-scale organized dealings” were inherently unfair. It specifically warned that “where copies could easily be distributed across the internet in large numbers” courts should not unduly focus on the aggregate amount of dealing, as it may “lead to disproportionate findings of unfairness when compared with non-digital works.”²⁸ In the educational context, such an assumption could also unfairly disadvantage larger educational institutions or students in larger classes.

Amount

The amount of the dealing is primarily concerned with the amount of a work copied in relation to the whole and in light of the purpose of the dealing. As *CCH* makes clear, there is no determinative amount or proportion of a work that may or may not be copied. If the amount copied is insubstantial, however, a fair dealing analysis is unnecessary, as copyright law permits the copying of less than a substantial part of a work.

Where a substantial part of a work is copied, users must consider the portion used both qualitatively and quantitatively to assess the fairness of the amount used in light of the user’s purpose. It may be fair to copy an entire work and depending on the type of work, it may be necessary to do so in order to achieve the relevant fair dealing purpose:

²⁷ *CCH*, *supra* note 4 at para 55.

²⁸ *York*, *supra* note 16 at para 105.

For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.²⁹

Alternatives

Alternatives to the dealing may be relevant if non-copyrighted equivalents are available and could realistically be used without disrupting the relevant fair dealing purpose.³⁰ If use of the copied work was reasonably necessary to achieve a pedagogical purpose, for example, this will weigh in favour of fairness. If materials would have been “equally effective” without copying the work, this may weigh against fairness. When considering whether an alternative is realistic in the educational context, the Court in *Alberta (Education)*, notes that “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks...Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students’ research and private study.”³¹

CCH also explicitly states that the availability of a licence to purchase the work is “not relevant to deciding whether a dealing has been fair.”³² If a dealing is fair, of course, no licence is needed.

Nature

The nature of the work considers a work’s intended audience and distribution, particularly as it relates to its publication status. In *CCH*, the court noted that if a work had not been previously published it may be more fair to reproduce it, as such reproduction could lead to a “wider public dissemination of the work — one of the goals of copyright law.”³³ Interestingly, this interpretation departs from UK and U.S. case law, where they have found that an author’s right to control the dissemination of

²⁹ *CCH*, *supra* note 4 at para 56.

³⁰ *Ibid* at para 57.

³¹ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 32, [2012] 2 SCR 345 [*Alberta (Education)*].

³² *CCH*, *supra* note 4 at para 70.

³³ *Ibid* at para 58.

their work, in this case to allow it to remain unpublished, outweighed a public good in broad distribution.

Case law in the U.S. also suggests that the nature of the work is relevant because certain works are “closer to the core of intended copyright protection than others.”³⁴ It may be more fair to use an informational work like a news broadcast, scientific article, or biography, for example, than to copy an expressive work like a movie or novel. In an educational context, the nature of the work used should be assessed in light of the pedagogical purpose.

Effect

The effect of the dealing on the work asks users to consider whether their use will “compete with the market for the original work.”³⁵ If their use will compete with or replace demand for the original, this may lead towards unfairness. Uses that do not substitute for the original work in the market are more likely to be fair (even if they harm demand for the original in a different way such as by mounting a compelling critique).

In *Alberta (Education)*, the court addressed this factor in relation to educational copying from textbooks, noting that while the market for textbook sales had shrunk over time, “there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.”³⁶ Here, the court affirmed that the applicability of the market substitute factor must be directly related to the dealing in question.

³⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994) at para 586.

³⁵ *CCH*, *supra* note 4 at para 759.

³⁶ *Alberta (Education)*, *supra* note 30 at para 33.

Appendix Two: Beyond Fair Dealing – More Good News about Copyright for OER

In the Code itself, and in Appendix One, we have addressed in some depth how to understand and apply fair dealing and how to understand the limitations of copyright law. However, fair dealing is not the only aspect of Canadian copyright law, and of intellectual property (IP) law more broadly, that can apply to allow the lawful creation of open educational resources. Without attempting to be comprehensive, we offer additional information below about low-risk practices that may help to lighten the burden of legal compliance. We have included copyright doctrines other than fair dealing that may apply to potential OER inserts, as well as some other areas of IP law which may be relevant to the OER community.

Our goal here is to address various areas of potential concern, indicating situations in which the use of an insert may not even require a fair dealing assessment. These include situations in which copyright might seem to apply to a source work but actually doesn't, such as when 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, authors may identify content that is seemingly subject to copyright (images, texts, compositions) that they might like to incorporate as inserts, in whole or in part. It's possible that some of those works may be usable because they aren't protected by copyright, for one or more reasons.

A work falls into the public domain in Canada when copyright protection has expired. When sourcing material from the internet it is important to note that much of the material is not in the public domain, despite it being publicly available. In addition, copyright protection is assigned automatically upon creation of an original work; therefore, absence of a copyright statement or symbol is not evidence of a work being in the public domain.

Works in the public domain can be freely used without having to seek permission, pay royalties, or rely on *Copyright Act* exceptions. In Canada, works enter the public domain in a number of ways:

- The general rule is that copyright in a work lasts for the life of the last surviving author, plus an additional 70 years if the last surviving author died in 1972 or later. If the author died prior to 1972 then the copyright term was 50 years past the year of death of the author.

There are exceptions to this rule for certain categories of works, such as:

- Some posthumously published works, which are subject to rules based on the date of the author's death as well as the subsequent publication date (if any). Works which are published posthumously prior to 1999 expire after whichever is the longer of 50 years after publication or 70 years after the death of the author. And works of authors who died between 1949 and 1999, if not published prior to 1999, are protected whichever is the longer of: until 2049 or until 70 years after the death of the creator.
- Works produced by federal government agencies in Canada are generally subject to Crown copyright, which expires 50 years after publication. Crown copyright is perpetual in government works that are never published. Most works that are subject to Crown copyright may be used for non-commercial purposes, however, it is important to check the source for terms of use. Government of Canada legislation, statutes, regulations, court decisions and tribunal decisions are not protected.
- Sound recordings and non-dramatic cinematographic works remain in copyright for 70 years following the date on which they are made, unless they are published prior to copyright expiring, in which case they remain protected for either 75 years after publication, or 100 years from the date they were created, whichever time period is the shortest.

Putting aside the above exceptions, it's otherwise safe to assume that a work is in the public domain in Canada if all the authors have been dead for at least 70 years.

Once it is determined that a particular work is in the public domain, it is free for anyone to use and adapt, as far as Canadian copyright law is concerned. But sometimes challenges arise when public domain materials are subject to restrictions based on where they are housed or hosted. For example:

- When the source copy of a public domain work resides in a library, archive, or museum, that institution can dictate terms of use and restrict what can be done with the work, as a condition of access. Often such conditions have

nothing to do with copyright, but unfortunately may limit the ways in which the works in question can be used. It is important to note that restrictive terms of use are specific to the institution, and that a copy of the same public domain work, if it can be obtained elsewhere, may be used without having to negotiate with the owner of the original.

- Some institutions may also assert copyright in their own photographs or digital reproductions of works in their collections. However, these claims have little or no merit in the case of verbatim reproductions of flat objects (texts, photographs, paintings, etc.). Photos of three-dimensional objects (like sculptures), on the other hand, are more likely to enjoy some level of copyright protection. In addition to fair dealing, there may be other exceptions available when making use of such works.
- While the focus of this document is on considerations for Canadian creators of OER in the Canadian environment, creators of OER who anticipate global adoption and adaptation may need to give consideration to when materials enter into the public domain in other jurisdictions.

Another category of public domain works that can be used freely and in their entirety, without needing to make any more detailed inquiry are works that consist entirely of data or other factual information arranged in common or well-established ways - for example, a chronological list of reigning monarchs, a table of rainfall statistics, or a pie chart of government expenditures. This is because facts and data, when presented and organized in a simple and unoriginal fashion, are not subject to copyright protection. In other words, a simple data set (or representation of data) is likely to be in the public domain whether it is newly created content or historical data.

While there are cases where Indigenous knowledge may be in the public domain according to Canadian copyright laws, creators should endeavour to seek guidance from appropriate Communities of practice and knowledge sharing protocols. To learn more about the respectful use of Indigenous knowledge, please see *Appendix Three: Indigenous knowledge and considerations for inclusion in OER*.

Built-in Constraints on the Scope of Copyright

Copyright doctrine also makes it clear that even where a work is protected by copyright, not everything found in it can be protected. In fact, copyrighted sources include more available material than might first be imagined, and a good place to

start in assessing the availability of specific content is by asking whether the elements to be used are actually subject to copyright protection.

A basic premise of copyright law in Canada as well as many other jurisdictions is that while copyright may exist in a work, the underlying ideas in a work are not protected by copyright. This is known as the idea/expression distinction - the proposition that underlying discoveries and insights or general themes and abstract concepts 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 copyright protection.

For example, an OER author may be inspired by a commercial textbook author's survey of Canadian history from a feminist perspective to create a set of open learning resources employing a similar theme. The new work in this case would not infringe copyright in the commercial textbook. However, other applications of the idea/expression distinction are more complicated. Suppose, for example, that the author of an OER intended to familiarize nursing students with new medical technology and 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 potentially copyrightable content that expresses or conveys a particular bit of practical information. In this case, it can be argued that when there are only a limited number of useful ways in which it is reasonable to express a given idea, none of them should be subject to copyright protection.

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 replacing them with original creative content of one's own. It should be recalled, however, that the protected elements may include the way in which the unprotected information or content was selected and arranged in the original work.

OER creators can also consider the use of a few lines of a work an 'insubstantial use' that would not trigger any copyright protection or require the permission of the

copyright owner.³⁷ Although not defined in the *Act*, the concept of insubstantiality has been addressed in case law and considered by the Canadian Copyright Board in their tariff decisions. Furthermore, the Supreme Court has stated that a “substantial part of a work is a flexible notion. It is a matter of fact and degree [...] As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgement expressed therein.”³⁸ Like any use of third-party materials, it is important to properly acknowledge the source of the insert.

Other Copyright Act Exceptions

Canada’s *Copyright Act* contains exceptions other than fair dealing which may be useful to OER creators wishing to make use of third-party content. Added to the Act in 2012, the non-commercial user-generated content (UGC) provision, also known as the “mash-up” or “YouTube” exception, states that “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 work that is “available through the Internet” for “educational or training purposes.”³⁹ This could

³⁷ Access Copyright - Tariff for Elementary and Secondary Schools, 2010-2015. (2016), online: Copyright Board of Canada (cb-cda.gc.ca). <https://decisions.cb-cda.gc.ca/cb-cda/r/en/item/366763/index.do/>.

³⁸ *Cinar Corporation v. Robinson*, 2013 SCC 73 at para 26, [2013] 3 SCR 1168.

³⁹ *Copyright Act*, RSC 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.

bring added reassurance to members of the OER community acting for an “educational institution”⁴⁰ when they make copies of or communicate materials that they find lawfully available online in the absence of any notice or digital lock prohibiting them from doing so. Conditions, such as attribution, should be reviewed when considering these exceptions.

Other Areas of Intellectual Property:

Trademark Law

Trademark protects brand owners against a certain range of commercial misrepresentations that may cause confusion in the marketplace or depreciate the value of goodwill in the brand. For example, it limits coffee companies other than Starbucks from using in the course of trade a confusingly similar round, green, mermaid logo 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 the course of trade” – designed to sell or promote to or engage customers.

Thus, OER makers should feel confident when:

- 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;

⁴⁰ *Ibid* at s.2.

- using visual marks for strictly decorative purposes unrelated to the pedagogical purposes of the OER (which may also infringe copyright).

Patent Law

Just as trademark law operates only in a narrow range of commercial practices, the same is true of patent law. Unless the work is “practising” a patented invention or directly encouraging others to do so, this type of use is 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 the work encourages others to infringe a known preexisting patent – 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.

Appendix Three: Indigenous knowledge and Considerations for Inclusion in OER⁴¹

This Code has focused on the copyright considerations, specifically the application of fair dealing, for the inclusion of third-party copyright-protected material in the creation and adaptation of OER. It has emphasized the critical importance of selecting materials for pedagogical purposes and illustrated how the fair dealing factors should be assessed in four typical use cases. However, it is important to note that the inclusion of Indigenous knowledge and cultural expressions can generate non-copyright related considerations.

In indigenous communities it is usually a group or society, rather than an individual, who holds the knowledge or expressions. These groups monitor or control the use of these expressions to pass on important knowledge, cultural values, and belief systems to later generations. The groups have authority to determine whether the knowledge, expressions, stories, and images may be used, who may create them and the terms of reproduction. Before the copyright law was developed in the Canadian common law and statutory law, the various confederations, nations, tribes, clans, and societies created, preserved, and nourished this knowledge and these expressions.⁴²

Indigenous Knowledges may include skills, innovations, know-how and practices developed by Indigenous peoples related to biodiversity, agriculture, health, and craftsmanship. As a further definition: “Indigenous knowledge and cultural expression include but are not limited to tangible and intangible expressions including oral traditions, songs, dance, storytelling, anecdotes, place names, and hereditary

⁴¹ Some material for Appendix Three was taken, with permission, from McNally, M., Lar-son, K., Lachaine, C, Field, E., Ludbrook, A, et al. (2023). A National Advocacy Framework for Open Educational Resources in Canada. *OER National Strategy - Stratégie nationale en matière de REL*. <https://www.carl-abrc.ca/wp-content/uploads/2023/05/A-National-Advocacy-Framework-for-Open-Educational-Resources-in-Canada.pdf>.

⁴² Standing Committee on Industry, Science, and Technology, *Evidence*, 1st Session, 42nd Parliament. (31 October 2018), 1600 (Monique Manatch, Indigenous Culture and Media Innovations). <http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-135/evidence>.

names.”⁴³ As well it is important to note that Indigenous knowledge is not static and does not only relate to traditional knowledge as further stated in the CFLA-FCAB *Position Statement Indigenous Knowledge In Canada’s Copyright Act*: “Indigenous knowledge is dynamic and has been sustained and transformed. Indigenous people continue to produce new knowledge in new media including music, theatre and dance, photographs, film, poetry, literary expression, language applications, blogs, social media, digital collections, etc.”⁴⁴ In the Canadian context Indigenous refers to First Nations, Métis, and Inuit peoples of Canada.

The relationship between Indigenous Knowledges and Canadian copyright law is complex with copyright law creating gaps and barriers in which Indigenous communities are not able to remain the rightful owners of their Knowledges and cultural practices. This has led to Indigenous Knowledges not only being co-opted, but has allowed for the legalized theft of these Knowledges. The current Canadian *Copyright Act*, and Western adopted intellectual property regimes more generally, do not adequately recognize or protect Indigenous Knowledges and cultural expressions. A key failing of the current Canadian legislation is that it generally does not accommodate or reflect, among other things, Indigenous concepts of ownership and knowledge transfer, or an understanding of community ownership and its duration.

In the context of OER and Indigenous Knowledges, OER’s when developed in a culturally responsive manner can support the sharing of Indigenous Knowledges, language revitalization, and cultural resurgence. And while there are benefits to OER for both Indigenous and Settler communities there are special considerations that need to be taken to ensure that Indigenous protocols are being followed. Best practices need to be established to ensure that Indigenous Knowledges are not being co-opted and are being disseminated in a way that reflects community understandings of those Knowledges and ensures that certain Indigenous

⁴³ Canadian Federation of Library Associations, *Position Statement Indigenous Knowledge In Canada’s Copyright Act*. (2018), online: Canadian Federation of Library Associations http://cfla-fcab.ca/wp-content/uploads/2018/05/CFLA-FCAB_Indigenous_knowledge_statement.pdf.

⁴⁴ *Ibid.*

Knowledges remain owned and protected by the communities that they originate from.⁴⁵

In the 2018 Intellectual Property Strategy, the Canadian Government committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁴⁶ Article 31 of UNDRIP specifically addresses Indigenous knowledge and cultural expressions:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.⁴⁷

On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and came into force.⁴⁸ This legislation seeks to aid in the implementation of UNDRIP as an obligation of the Federal Government. As Canada works towards adopting UNDRIP and understanding and ensuring the appropriate means in which to recognize and protect Indigenous knowledge and cultural expressions, creators, and adapters of OER should consult with Indigenous communities prior to using any Indigenous content, regardless of the outcome of a

⁴⁵ Krista McCracken and Skylee-Storm Hogan, *Community first: Open practices and Indigenous Knowledge*. (2020), online: eCampusOntario. <https://www.ecampusontario.ca/wp-content/uploads/2020/08/OEProject-McCracken.pdf>

⁴⁶ Innovation, Science and Economic Development Canada, *Intellectual Property Strategy*. (2018), online: Innovation, Science and Economic Development Canada. <https://ised-isde.canada.ca/site/intellectual-property-strategy/en>.

⁴⁷ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*. (2 October 2007), online: United Nations. https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf.

⁴⁸ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

fair dealing or public domain assessment. This will aid in establishing ethical and respectful use of Indigenous knowledge and cultural expressions.