



# Decoding the “Code of Best Practices in Fair Dealing for Open Educational Resources (OER)”

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Images by Giulia Forsythe

# U.S. Codes of Best Practice

## U.S. Codes of Best Practice:

- intended to “reclaim fair use”
- made by the community for the community
- provide a shared framework for assessing when and how fair use applies to specified activity



## US Code of Best Practice in Fair Use for OER

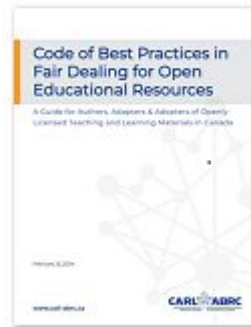
- includes a Canadian appendix written by Dr. Carys J. Craig
  - provides Canadian legal context for applying fair dealing to OER

# Canadian Code for OER

## Canadian Code:

- Adapted/written by a CARL working group
- Underwent legal review
- Received feedback from communities of practice (copyright and OER)

Provides a legal framework for the application of fair dealing to copyrighted inserts in OER



## The Code is:

- A tool to assist Canadian OER creators with working through fair dealing and the risk-benefit analysis as it applies to copyrighted inserts for OERs
- Intended to foster institutional and legal support for applying fair dealing to OER

# The Code - Structure and Format

- Introductory material contextualizes the Code for users
  - **Open Educational Resources and Fair Dealing**
    - Why we need the Code
  - **Open Education Resources, Inserts and Universal Access**
    - How fair dealing supports pedagogical goals and facilitates access to copyrighted content
  - **Behind the Code: Copyright Flexibilities and Fair Dealing in OER**
    - Testing for fair dealing & the six factors
  - **Applying This Code**
    - How to apply the Code

# The Code - Structure and Format

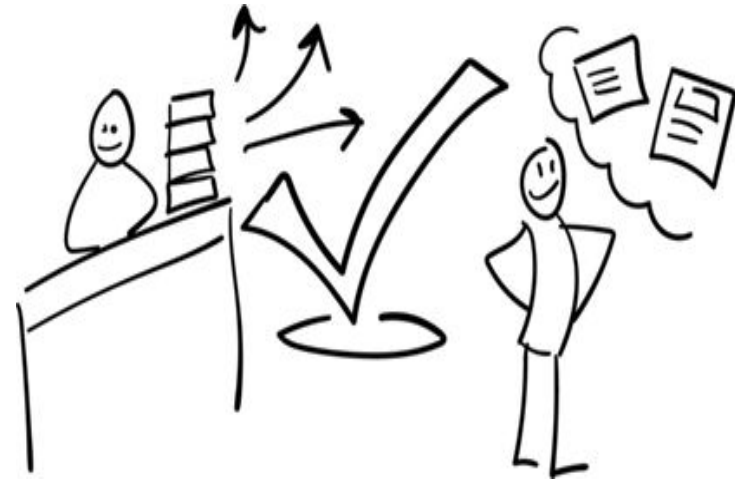
- The Code section applies fair dealing to 4 common use cases for OER
  - **Using Inserts as Objects of Criticism and Review**
  - **Including Inserts for the Purpose of Illustration**
  - **Incorporating Content as Learning Resource Materials**
  - **Repurposing Pedagogical Content from Existing Educational Materials**
- Additional section: **Acknowledging Fair Dealing**
  - Recommends acknowledgement as a best practice
  - Provides guidance on attribution for inserts

# Appendices: History, Evolution and Beyond fair dealing

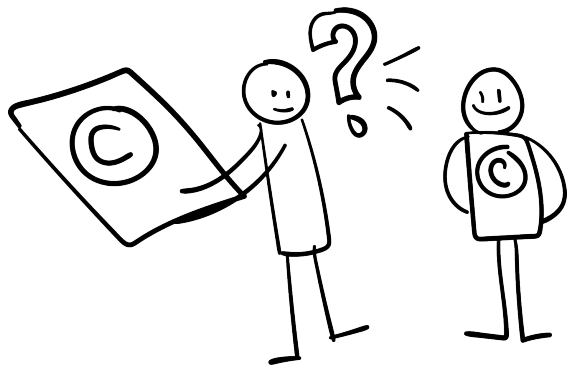
Appendix One: Fair Dealing in Canada - History and Evolution

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

Appendix Three: Indigenous Knowledge and Considerations for Inclusion in OER

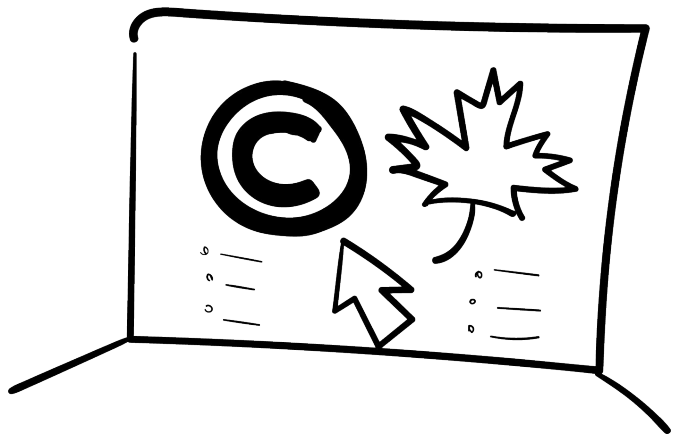


# Adapting the Code for the Canadian Context



- More “adaptation” required than originally anticipated
- Generally retained format/style of US code, but significant rewriting of content needed
- Removed references to US Copyright Act and US-specific copyright doctrines - transformative use, “merger” doctrine
- “Fair dealing” vs “fair use” – differences in legislation, jurisprudence, practical application

# Adaptation Decisions

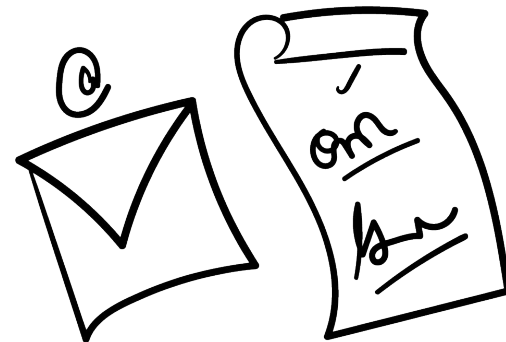


- Entire sections removed e.g. some of the original appendices
- New content added to provide Canadian context, e.g. fair dealing's history and evolution
- Retained 4 “use cases” but illustrated with Canadian examples & explained re Canadian law
- Clarified some terminology, e.g. “openly-licensed” vs. “copyright-protected”
- Retained the descriptor “inserts”
- Opted not to link out to case law, relevant sources



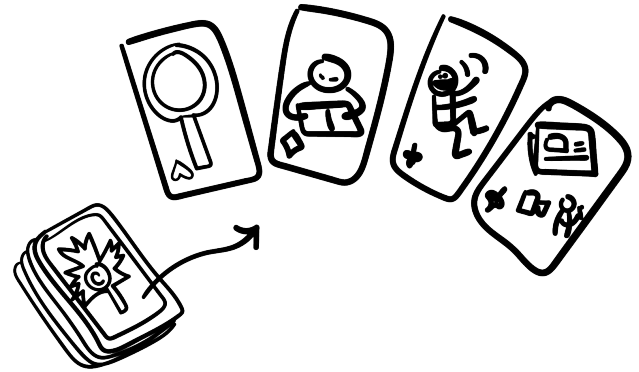
# How far to push the envelope?

- US Code was informed by significant pre-consultation with OER practitioners
- Also has more of an advocacy mission/call to action
- Canadian adaptation arguably more conservative - relies on well-established fair dealing practices
- Intentional exclusion of content that was out-of-scope, e.g. licensed materials
- In general, stayed away from providing legal advice & instead direct readers to local copyright expertise



# Legal Review

- Further adjustments made on the recommendation of legal reviewers, including:
  - Not relying on a single fair dealing purpose
  - Clarification of “purpose” in 2nd step vs. 1st step
  - Clarification of “perspective” re purpose - student’s purpose vs. OER author’s
  - Strengthening language re attribution requirement; removing imprecise language
  - Emphasizing holistic approach when assessing fair dealing



# What is OER, and why does it require an additional fair dealing analysis?



“5Rs-7(transparent)”, Ashlyne O’Neil, et al., [Making Open Educational Resources: A Guide for Students by Students CC BY-NC-SA 4.0](#)

# The Code: Use Cases

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# Use Case 2: Including Inserts for the Purpose of Illustration



EXAMPLE: You are teaching a course on Canadian Federal Politics and campaign styles and want to show students examples of political posters.

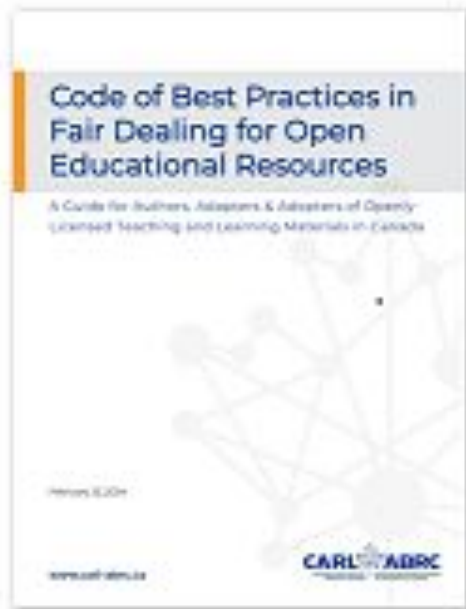
# Use Case 2: Including Inserts for the Purpose of Illustration

## Description

- Principles
- Considerations
- Challenging Cases

# The Importance of Attribution

# Adopting/Adapting the Code



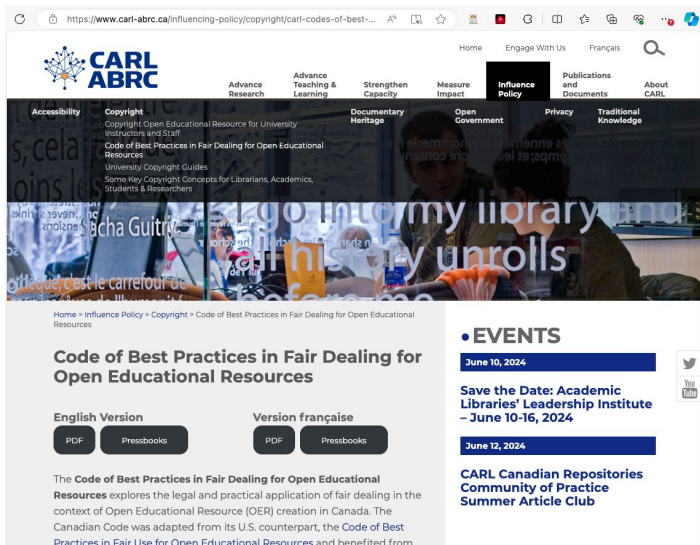
CC BY 4.0

**ATTRIBUTION 4.0 INTERNATIONAL**  
Deed





# Adopting/Adapting the Code



Home > Influence Policy > Copyright > Code of Best Practices in Fair Dealing for Open Educational Resources

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

English Version: PDF, Pressbooks  
Version française: PDF, Pressbooks

The **Code of Best Practices in Fair Dealing for Open Educational Resources** explores the legal and practical application of fair dealing in the context of Open Educational Resource (OER) creation in Canada. The Canadian Code was adapted from its U.S. counterpart, the Code of Best Practices in Fair Use for Open Educational Resources and benefited from

- EVENTS
- June 10, 2024  
Save the Date: Academic Libraries' Leadership Institute – June 10-16, 2024
- June 12, 2024  
CARL Canadian Repositories Community of Practice Summer Article Club

[www.carl-abrc.ca/influencing-policy/copyright/carl-codes-of-best-practice-fair-dealing/](https://www.carl-abrc.ca/influencing-policy/copyright/carl-codes-of-best-practice-fair-dealing/)

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## Suggested Citation

*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* © 2024 Canadian Association of Research Libraries is licensed under [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/). This work is adapted from the [Code of Best Practices in Fair Use for Open Educational Resource](https://www.uuw.cl/oer/) available at [auw.cl/oer](https://www.uuw.cl/oer/) and licensed under a [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/) licence, which was facilitated by Meredith Jacobs, Peter Jaszi, Prudence S. Adler, William Cross.

# Adopting/Adapting the Code

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Appendix One: Fair Dealing in Canada - +

THE CODE: Principles, Considerations, and Challenging Cases

Using inserts as objects of criticism and review

Acrobat Reader File Edit View Window Help

CARL\_Code\_Best\_Pra... X + Create

All tools Edit Convert E-Sign Find text or tools

License statement

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

February 12, 2024

www.carl-abrc.ca

Legal Disclaimers

Contributors

Disclaimer

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# Legal Disclaimer

## **Legal Disclaimer:**

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

# Adapting/Adopting

The six factors are:

- 1. The purpose for making the copy.** Having addressed the broad purpose of the work, this factor examines the user's real purpose or motive in re-creating 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 OER unfair.
- 2. The character of the copying.** This factor reviews the intended use of the copy. Generally, a single, one-off copy is more likely to be fair than multiple 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 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 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 purposes have been made effectively without using the copyright-protected work, it will tend towards unfairness. Additionally, it is not necessary to acquire the work that is available under a licence or subscription as an alternative to copying.
- 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 the market for the original.

## Appendix Three: Indigenous Knowledge and Considerations for Inclusion in OER

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.<sup>41</sup>

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.<sup>42</sup>

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 names."<sup>43</sup> 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

<sup>41</sup> 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 REO*. <https://www.carlabrc.ca/wp-content/uploads/2023/05/A-National-Advocacy-Framework-for-Open-Educational-Resources-in-Canada.pdf>

<sup>42</sup> 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/msetting-133/evidence>

<sup>43</sup> 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](http://cfla-fcab.ca/wp-content/uploads/2018/05/CFLA-FCAB_Indigenous_knowledge_statement.pdf)

## 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).

original work. Copying will tend to be fair if it has no detrimental impact on the market for the original.

# Use Cases

## 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-use\* 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 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

\* 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.

# The Code in the wild

**NSCC**  
Libraries

Library / Subject Guides / NSCC OER Toolkit -- Adopt & Adapt OER / OER Code of Best Practices

## NSCC OER Toolkit -- Adopt & Adapt OER

Adopt & Adapt Open Textbooks

Creative Commons Licensing

OER Sprints

OER Code of Best Practices

Print on Demand (POD)

NSCC OER Champions Videos


### OER Code of Best Practices

Code of Best Practices in **Fair Dealing** for Open Educational Resources [2024]. A Guide for Authors, Authors, and Learning Materials in Canada

Code of Best Practices in **Fair Use** for Open Educational Resources [2021]. A Guide for Authors, Adapt and Learning Materials.

- [Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?](#)

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JUNE 10, 2021

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

By Cicely Wilson

American University's Washington College of Law, along with other academic contributors, has launched the *Code of Best Practices in Fair Use for Open Educational Resources* (the Code). This forty-plus page report, the goal of which is to assist professors, teachers, librarians, and other educators in evaluating when and how they can incorporate third party copyright materials into Open Educational Resources

# Implementing The Code

g/licensing#s-ig-box-16323964

## Fair dealing and OER

To consider how to apply fair dealing to OER creation, we can use the [Code of Best Practices in Fair Use for Open Education Resources](#). Please note that "fair use" is the U.S. equivalent of Canada's "fair dealing." While fair use and fair dealing are not identical, [Appendix Three: Educational Fair Dealing in Canada](#) details how the Code can be applied in a Canadian context as well.

The Code has four Principles for using "inserts" of copyright-protected works in OER:

- Using inserts as **objects of criticism and commentary**. For example, fair dealing might justify using a specific film clip in a film studies course for the purpose of critique.
- Including inserts for the **purpose of illustration**. For example, fair dealing might justify using a lab photograph when studying a classic experiment for the purpose of illustration.
- Incorporating content as **learning resource materials**. For example, fair dealing might justify using an episode of a popular TV show in a Spanish language class for the purpose of promoting mastery of language skills.
- Repurposing pedagogical content from existing educational materials**. Fair dealing supports the selective incorporation of elements from sources that are not currently in wide use as course materials, subject to the following:
  - Authors should consider which parts of the source material are protected by copyright, as many types of factual content are not protected by copyright. For example, general topics, such as subject matter, organization, and broad choices, are beyond the reach of copyright protection. Similarly, short snippets are allowable as quotations.
  - 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 specific in what ways, if any, the material was updated.
  - Authors should be prepared to explain why their OER does not function as a market substitute (for example, because the incorporated work is intended for a different audience than the OER).

To summarize the Code, the main considerations of the Principles are:

- All inserts should have appropriate attribution. This attribution should indicate that the inserts are being used under fair dealing exceptions.
- Authors should be prepared to explain the pedagogical value of each selection.
- Inserts should be directly related to the content (and not, for example, photos of cute baby animals).
- The "amount" of the insert should be qualitatively and quantitatively appropriate, depending on the context. For example, fair dealing might justify the use of an entire short article for reflection or response, but not a longer text when students are only expected to engage with a portion.
- When using multiple inserts, authors should attempt to draw from a range of sources.

It's also worth noting that these Principles are not limited by the possibility that others may make further use of copyright-protected works; these "downstream" uses are not the responsibility of the authors, who have relied appropriately on fair dealing assessments.

So can I rely on fair dealing when I'm creating an OER?

[Licensing & Copyright - Open Educational Resources \(OER\) - RDP Library at Red Deer Polytechnic \(rdpolytech.ca\)](#) CC BY-NC-SA 4.0



## Open Educational Resources

Supporting the use of existing Open Educational Resources (OERs), and their creation, is an important priority for the Libraries as unaffordable textbooks or increased costs for textbook access, create unequal opportunities to learn. We know that many students attempt to complete their coursework without access to a prescribed text. The use of OERs as an alternative to commercial textbooks is growing as automatic textbook billing becomes a more prevalent textbook sales model on university and college campuses.

Strategically marketed as "Inclusive Access" or "Equitable Access," these programs usually start with an agreement between an institution, a bookstore and one or more publishers. Variations on this model are also marketed to course instructors as an appealing option for students, without regard to the disadvantages of the automated textbook model, which include removal of student consumer choice, the elimination of the no cost option offered by OERs, the risk for students of being locked out of essential elements of the course (e.g. quizzes and exam preparatory materials) if they opt out of the textbook, the compromise to student privacy in being required to disclose personal information to a third party automatic textbook billing vendor website, and the very limited period in which students have an opportunity to opt out before they are automatically billed for the cost.

Access to textbooks, or specific chapters, through Course Reserves is increasingly impossible as

publishers shift to licensing electronic, temporary, access only to students. Students are not able to share or resell textbooks. Commercial academic publishers' textbooks are primarily sold in e-Book format, and are often interwoven with lab content, assignments, exams, and other instructional and assessment tools, effectively eliminating the ability of a student to opt-on.

Not surprisingly, investment in OERs is a viable and growing alternative. These include open-source texts, media, and other instructional content that is usually free for users to use, modify, and distribute to students. UNB Libraries maintains a [list of OER publications](#) from across Canada and the U.S. and can advise course instructors on their use. In 2024, the Canadian Association of Research Libraries (CARL) published its [Code of Best Practices in Fair Dealing for Open Educational Resources](#), to illustrate how OER creation reaffirms fair dealing in education to balance with the rights of copyright owners.

Through our association with the Council of Atlantic Academic Libraries (CAAL), UNB course instructors can make use of AtlanticOER, which provides a digital publishing platform that also enables instructors to embed their OERs directly into D2L. CAAL also provides development grants to support creation, adaptation, and use of OERs. Through AtlanticOER, Atlantic Canadian students have already saved almost \$900,000 in textbook costs.

If you would like to know more about OERs, please contact

**Mike Nason**  
Open Scholarship &  
Publishing Librarian

**Joanne Smyth**  
Director of Collections Strategy  
& Scholarly Communication.



# Conclusion



\*Guidelines, not  
brightlines

\*Needs to fit alongside  
your institutional context

\*We hope you will  
encourage adoption!



# Questions