

## Using Copyrighted Content within Open Educational Resources

This tool is intended to help OER champions readily navigate how and when to appropriately include Copyrighted materials in open educational resources. This resource is derived from information regarding Copyright, Fair Use and OER, including:

- Code of Best Practices in Fair Use for OER, available at [auw.cl/oer](http://auw.cl/oer) is licensed under [CC-BY 4.0](https://creativecommons.org/licenses/by/4.0/)
- [Code of Best Practices in Fair Use/Fair Dealing for OER: Webinar and Workshop](#) from the Association of Research Librarians
- Kenneth D. Krews and Dwayne K. Buttler, [Fair Use Checklist](#) is licensed under [CC-BY 4.0](https://creativecommons.org/licenses/by/4.0/)
- Rich Stim, [Measuring Fair Use: The Four Factors](#) is licensed under [CC-BY-NC](https://creativecommons.org/licenses/by-nc/4.0/)

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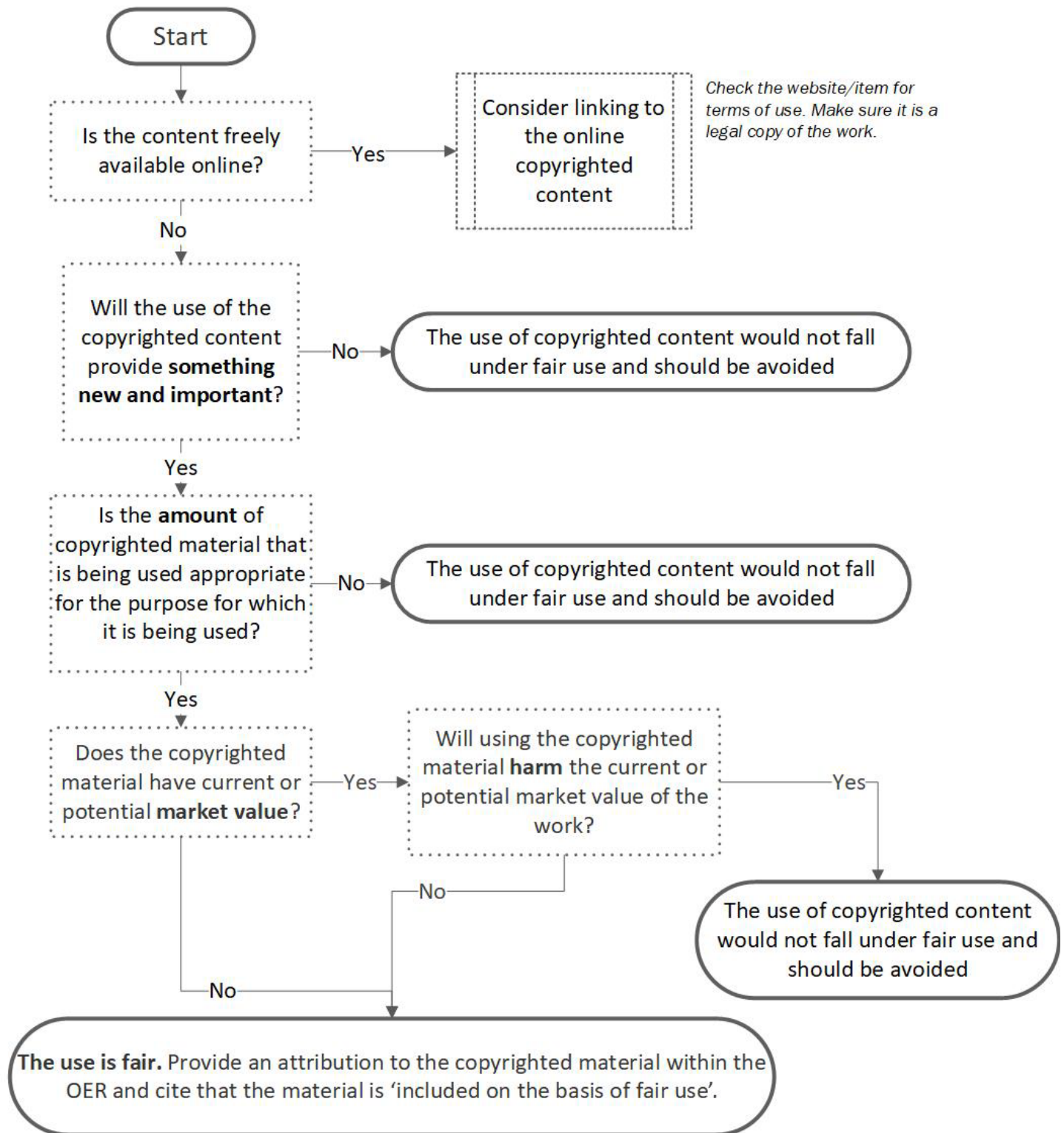
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## What material can be incorporated without using ‘fair use’?

Materials with a [Creative Commons License](https://creativecommons.org/licenses/by/4.0/) grant specific permissions to the users (e.g., free to use and share, can make changes to the work). Material within the **public domain**, including:

- **All pre-1926 U.S. works** (as of 2021, see [copyright.gov](http://copyright.gov) for updated info)
- **Works created on the job by U.S. government employees** (e.g., NASA videos, White House webpages, CDC reports). This does not apply to works commissioned by the federal government from third parties, some materials created by hybrid agencies (e.g., Smithsonian Institute), and non-federal employees (e.g., state or local government, foreign government). *Yet, these works could be incorporated under fair use (see [decision chart](#)).*
- **Data or other factual information arranged in common or well-established ways.** Examples: Table of rainfall statistics, plant hardiness zone map, pie chart of government expenditures, chronological list of reigning monarchs.

# Copyright Decision Chart



## Process Description:

1. Is the content freely available online?

- If yes, consider linking to the online copyrighted content. Linking to the content ensures that the use and presentation of the work fits the intention of the copyright owner. One downside of this approach is that you will have to fix links that become broken in the future. If your students need to access this content offline and thus linking is not a great option, proceed to step 2.
- If no, proceed to step 2.

2. Will the use of the copyrighted content provide *something new and important*? E.g., Is the *purpose* of the copyrighted work changing? Is the use of the copyrighted material *addressing a new audience*?

- If yes, proceed to step 3.
- If no, the use of copyrighted content would not fall under **fair use** and should be avoided.

3. Is the *amount* of copyrighted material that is being used appropriate for the purpose for which it is being used?

- If yes, proceed to step 4. Example: providing commentary of a copyrighted poem and including only the specific poem or applicable sections of the poem within the OER (e.g., [‘My God, It’s Full of Stars’](#)), but not, for instance, the collection of poems that the poem is published within (e.g., [Life on Mars](#) from Tracy K. Smith).
- If no, the use of copyrighted content would not fall under **fair use** and should be avoided.

*You may have heard of a rule regarding using up to 10% of a copyrighted work for fair use. This 10% ‘rule’ is not definitive – as long as the amount of copyrighted content that is used is appropriate for the purpose, then this would fall under fair use. Also know that even small amounts (much less than 10%) of copyrighted content that make up the ‘heart of the work’ have been deemed a violation of copyright. See [Columbia University Libraries Fair Use](#) information.*

4. Does the copyrighted material have current or *potential* market value?

- If yes, proceed to step 5. Example: current math textbook that is available for purchase
- If no, proceed to step 6. Example: out-of-print math textbook from 1980s

5. Will using the copyrighted material harm the current or *potential* market value of the work?

- If yes, the use of copyrighted content would not fall under **fair use** and should be avoided.
- If no, proceed to step 6.

6. The use is fair. Provide an attribution to the copyrighted material within the OER and cite that the material is ‘included on the basis of fair use’.

For guidance on attributing work within OER, see [best practices for attribution](#). In addition, document your decision and justification for using this content under fair use. Why is this content the best choice for the intended purpose of your OER? You could use the [Fair Use Evaluator](#) to create a pdf record of your decision.

## Justifications for fair use within the context of Open Educational Resources

Including copyrighted material for the purpose of criticism and commentary. Examples:

- Providing examples of commercial advertisements in an assignment in which students analyze the messaging and provide a critique on their effectiveness for a Marketing Course.
- In an English Composition text, providing Martin Luther King Jr.'s 'I Have a Dream' speech along with an analysis and deconstruction of the elements within the speech and how this structure advances the key message.

Including copyrighted material for the purpose of illustration that anchors what is being taught in tangible examples and enriches the pedagogical purpose and narrative of the teaching materials. Examples:

- Including scientific drawings of human anatomy to provide students with many different ways of exploring anatomical features within an anatomy and physiology textbook.
- Including clips from a series of Hollywood movies can support an educator's generalizations about how cultural attitudes toward working women have changed over decades.
- Providing an iconic news image may galvanize students' interest in the 1960's Civil Rights Movement within U.S. History textbooks.
- Including an image of Children's Tylenol drug facts and information for use in a weight-based calculation example in the [OpenRN Nursing Skills OER Textbook](#).

*With images, consider whether you are including the image as a 'nice to have' or because this is the only image available that illustrates what you need to convey. If alternative images exist that have more open licensing (e.g., CC-BY), use these instead.*

Including copyrighted material for the purpose of accurately reflecting what students will encounter outside of the classroom. In this case the original copyrighted material was not intended for educational purposes.

Examples:

- A nursing program preparing students to interpret patient monitoring systems provides excerpts from manufacturers' operating manuals within the textbook.
- Including excerpts from a University Extension fact sheet on common diseases of ornamental shrubs for a Landscape Horticulture textbook. The original intended audience of the fact sheet is 'home gardeners and commercial horticulture practitioners'.

Repurposing pedagogical content from existing educational materials. In this case the copyrighted educational content has limited to no market value (e.g., out-of-print) and still only a limited amount of the copyrighted content is used.

- In an OER general math book, a problem set from an out-of-print algebra text is borrowed and modified as needed.

## Checking licensing requirements

It is always a good practice to check the licensing requirements of content that you find online. In some cases, resources that can appear 'free' and available for use, actually have specific terms of use attached elsewhere on the website. Below are some licensing examples:

- [Gratisography license](#)
- [Pixabay item license](#)
- [Harvard Business Review – posting articles to Canvas](#)
- [TED Talks – usage policy](#)
- [Sound Cloud – grant of license](#)