



# Journal of Copyright in Education and Librarianship

ISSN 2473-8336 | [journals.ku.edu/jcel](http://journals.ku.edu/jcel)

Volume 8, Issue 1 (2025)

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Dickison, J., Johnson, R., Ludbrook, A., Martin, H., & Savage, S. (2025). Building Open Education Capacity: Introducing the Canadian Code of Best Practices in Fair Dealing for Open Educational Resources. *Journal of Copyright in Education & Librarianship*. 8(1), 1-15

<https://doi.org/10.17161/jcel.v8i1.23053>



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# Building Open Education Capacity: Introducing the Canadian Code of Best Practices in Fair Dealing for Open Educational Resources

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## Abstract

This article builds upon a presentation given at the 2024 ABC Copyright Conference in which the authors outlined the process for adapting the *Code of Best Practices in Fair Use for Open Educational Resources (OER)* for a Canadian audience. Originally published in 2021, the Code is an important tool for evaluating common OER use cases, providing a framework of analysis that can guide a creator toward making judiciously defensible fair use decisions. Alongside practical guidance, the Code represents a significant contribution in support of the United Nations Educational, Scientific and Cultural Organization's *Recommendation on OER*, which encourages member states to build capacity concerning exceptions and limitations for the use of copyrighted works for educational and research purposes. Supported by the Canadian Association of Research Libraries, the Canadian Adaptation Working Group began their adaptation process in late 2021, and the final version of the Code was published in early 2024. In addition to providing an overview of the adaptation process, this article offers a comprehensive summary of the legal considerations that informed the writing of the Code and provides examples of how the Code has been operationalized at educational institutions in Canada.

This article received editorial review, but the authors chose to forego peer review, which was optional for submissions consisting of conference presentations.



## Building Open Education Capacity: Introducing the Canadian Code of Best Practices in Fair Dealing for Open Educational Resources

### Introduction

As concerns about the rising cost of education grow, especially among students, so do discussions about the impact of open educational resources (OER) as an affordable alternative. Open educational resources are openly licensed, freely distributed educational materials that “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” (Canadian Association of Research Libraries [CARL], 2024, p. 5). David Wiley, a leading open education proponent, has defined OER based on a set of activities known as the “5Rs”: retain, reuse, revise, remix, and redistribute. For a work to fulfill its obligations as an OER, it must be licensed in a way that “provides everyone with free and perpetual permission to engage in the 5R activities” (Wiley, n.d., para. 1). To help reduce costs and enable more equitable access to course materials, many Canadian provinces and institutions have implemented programs to support OER initiatives, including the creation and adoption of OER as core course resources.

As these discussions evolve and as support for OER expands, one of the identified barriers to ensuring that OER fully achieve their pedagogical, pragmatic, and social functions is a reluctance on the part of OER creators to incorporate pedagogically relevant content from copyrighted sources into their works. This caution arises from a lack of information about copyright, leading to unnecessary fear and a tendency to avoid risk. There are, however, several exceptions in Canadian copyright legislation that allow for the use of copyright-protected materials for specific purposes, if certain conditions are met, without infringing copyright. These exceptions address the use of materials by not-for-profit educational institutions, libraries, archives, and museums, as well as by individuals. The most-discussed and arguably best-used exception is fair dealing. As paraphrased from Section 29 of the Copyright Act (1985), fair dealing for the purpose of research, private study, criticism, review, education, news reporting, parody, or satire does not infringe copyright, with the condition that fair dealing for criticism or review and news reporting requires attribution. While the Copyright Act provides limited detail, we can rely on several Supreme Court and Federal Court decisions for guidance on how to interpret the exception. OER creators can be reassured that the Canadian courts have overwhelmingly affirmed fair dealing as a users’ right and instructed that it must be given a large and liberal interpretation.

Because OER can reduce course material costs to students and address the ethical and sometimes legal obligations that education institutions have in making resources universally accessible, it is important to address the barriers that may limit the creation and adoption of them. It is particularly important that creators and adapters of OER have knowledge and resources to help them understand fundamental considerations, such as copyright. The *Code of Best Practices in Fair Dealing for Open Educational Resources* (the Code) explores the legal and practical application of the fair dealing exception in the context of open educational resources in the Canadian environment.

The Code, which is an adaptation of the U.S. *Code of Best Practices in Fair Use for Open Educational Resources*, was officially published by the Canadian Association of Research Libraries

(CARL) in February 2024.<sup>1</sup> It was produced by a CARL Working Group and benefited from review by Canadian legal scholars and experts from both the copyright and open education communities. In short, it supports OER creators and adapters in making judicious and legally defensible decisions in the application of fair dealing to third-party copyright-protected content they wish to incorporate into their OER.

This paper builds on the “Decoding the ‘Code of Best Practices in Fair Dealing for Open Educational Resources (OER)’” presentation that the authors gave during the ABC Copyright Conference in June 2024 (Johnson et al., 2024). The presentation provided an overview of how the Canadian Code came to be, including the history of codes of best practices more generally. It also delved into why we selected this Code for adaptation and why it is necessary. Additionally, the presentation outlined some of the critical Canadian legal considerations that we had to incorporate; the decisions we made in order to ensure we accurately addressed Canadian legislation, jurisprudence, and the OER environment; and how the Code is intended to serve the copyright and OER communities. This paper explores these topics more fully, particularly with respect to key considerations and decisions made during the writing process. This paper also provides additional explanation of the versatility of the Code and examples of how the Code has been used and adopted by institutions.

### **U.S. Codes of Best Practices in Fair Use**

In promoting the Code, it is important to acknowledge the U.S. codes of best practices in fair use. Over the past 20 years, our U.S. colleagues have developed numerous codes of best practice for the application of fair use to a variety of scenarios, including open educational resources. Each of the U.S. codes describes the evolution of fair use and formulate a nuanced approach to applying it in practice as permitted under law. As the U.S. authors have noted, the codes are intended to reclaim fair use and provide a framework for how fair use applies to specified use case scenarios. The codes are anchored in professional practice and are made by the community, for the community, with the help of legal and technical experts (Aufderheide & Jaszi, 2018).

Our U.S. colleagues laid the groundwork for Canadian adaptations as well as new original Canadian codes (CARL, n.d-a). They have provided a framework and clear purpose for the creation of similar codes that can be used in Canada and other jurisdictions around the world. Their codes have demonstrated their value within the communities of practice they serve. In our case we were fortunate that there are significant commonalities in the U.S. and Canadian communities of practice for which the codes are created. This benefits Canadian adapters as, generally, the in-depth consultations undertaken during the development of the U.S. codes are also applicable to the Canadian environment. For example, we were able to leverage the robust consultations undertaken by the authors of the U.S. Code, as the OER issues and considerations they identified, including the four common use cases, are equally relevant in Canada.

### **Why Is This Code Necessary?**

In Appendix One of the U.S. Code, the authors provide a qualitative assessment of the fulsome review they conducted with OER creators in advance of the drafting of their Code. Among the observations they provide is the recognition that “OER professionals experience a dearth of reliable

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<sup>1</sup> We are grateful to the authors of the U.S. Code, who paved the way for our Canadian adaptation. Particularly, we wish to thank Dr. Carys Craig, who contributed an appendix to the U.S. Code on the applicability of fair dealing to OER, thus providing much of the legal background that became the foundation for the Canadian version.

information about copyright in general and fair use in particular” and that where information is available, it tends to be “overly conservative, thus failing to represent the full scope of the doctrine as it stands today” (Jacob et al., 2021, p. 20). This sentiment is mirrored in the body of research that exists on barriers that prevent OER creation and adoption, in which insufficient copyright literacy is identified as a key concern for authors and adaptors (Henderson & Ostashevski, 2018; Luo et al., 2020). Using third-party copyright-protected content in OER has traditionally been seen as incompatible with the open licenses applied to OERs, and fair dealing is often advised as something that “should not generally be relied on when creating OER” (Scott, 2013, p. 19; see also Levey, 2012). Even for the Canadian copyright-savvy producers of a series of OER modules on copyright, a reliance on fair dealing was seen as incongruent with the open licensing requirements of their project at the time: “The emphasis on open licensing has circumscribed the project team’s ability to use content that is not permissively licensed” (Guy et al., 2019, p. 4). OER practitioners have also documented risk management approaches or have suggested finding alternatives for third-party content in OERs and have noted how time-consuming copyright checking can be when doing OER conversion projects with already existing teaching materials (Whitfield & Robinson, 2012).

In addition, we know that copyright information and support offered by Canadian institutions tend to be focused on traditional classroom environments and do not consider the broad and open dissemination inherent in OER (Di Valentino, 2016). A 2016 survey of copyright administrators in Canada reported that 27% did not offer instruction on finding copyright-free or openly licensed sources for faculty, although most did instruct on fair dealing (Zerkee, 2016, p. 9). In a 2022 survey at Dalhousie University, 84% of academic educators perceived open scholarship as a professional priority; however, more than 70% identified financial, time, and other resources as disincentives to open publication (Rothfus et al., 2024). As well, copyright literacy related to appropriately citing Creative Commons licenses, a popular open license used for OERs, has also been recognized as lacking, with some OER practitioners omitting the appropriate legal attribution of Creative Commons-licensed works, or finding such citation challenging (Blomgren, 2023; Norris, Swartz, & Kuhlmeier, 2022).

Beyond this is copyright chill, the phenomenon whereby users are uncertain about copyright law to the “point of causing anxiety, potentially discouraging or inhibiting legitimate uses of copyright-protected materials” (Wakaruk et al., 2021, p. 1). In a survey tracking users’ anxiety about copyright, Wakaruk et al. found that 50% of the respondents did not “feel safe” using third party materials in their projects, which were largely personal or educational (2021, p. 13). It was pointed out in the same study that such anxiety even amongst copyright administrators can lead to the dismissal of “a supportive fair dealing assessment when considering third-party content for inclusion in an open educational resource” (Wakaruk et al., 2021, p. 2).

In Canada, CARL supports and advocates for the strengthening of open educational practices that facilitate the creation of OER. Since 2019, CARL has been committed to increasing capacity to support OER via the establishment of an Open Education Working Group and has been involved since 2021 in the development and support of a National Strategy for Open Educational Resources – *Stratégie nationale en matière de ressources éducatives libres* (CARL, n.d.-b; McNally & Ludbrook, 2023). The Code is another example of CARL’s efforts to advance OER in Canada. The adaptation came out of a CARL advocacy work plan to Canadianize relevant fair use codes developed by the Center for Media & Social Impact at American University (Center for Media & Social Impact, n.d.). A rationale for adapting the fair use codes was written in 2021 (Swartz & Slaght, 2021). It



suggests that code adaptations support a clear path forward for user communities, enabling them to strengthen user rights and to deal fairly with copyrighted works with more certainty.

As part of the National Strategy for OER, an identified advocacy call to action is for the Canadian federal government to adopt the UNESCO Recommendation on Open Educational Resources (UNESCO, 2019). The UNESCO Recommendation on OER lists five objectives:

- (i) building capacity of stakeholders to create, access, re-use, adapt and redistribute OER;
- (ii) developing supportive policy; (iii) encouraging inclusive and equitable quality OER; (iv) nurturing the creation of sustainability models for OER, and (v) facilitating international cooperation. (2019, III. Areas of Action section, para. 1)

Specifically, 11.c of the Areas of Action in the UNESCO Recommendation states that “raising awareness concerning exceptions and limitations for the use of copyrighted works for educational and research purposes” is a key objective to help fulfill educational goals and facilitate the creation of OERs (2019, para. 3.). Moreover, 11.e asks for the creation of “easily accessible” resources “that provide information and assistance to all OER stakeholders on OER-related topics, including copyright and open licensing of educational material” (UNESCO, 2019, para. 3). From the outset, the goals of our adaptation were aligned with the UNESCO Recommendation. We strove to create a user-friendly, accessible, and easy-to-follow copyright resource that could guide practitioners (copyright administrators and creators of OER) on the application of the fair dealing exception to OER in the Canadian context.

### **Adapting the Code for the Canadian Context**

When we initially approached the task of adapting the U.S. Code, the expectation was that it would require relatively minor adjustments to the original text. The U.S. Code already contained a comprehensive analysis of the similarities between U.S. fair use and Canadian fair dealing, in which author Dr. Carys Craig noted “the general Principles and Best Practices set out in this Code are intended to be equally appropriate for U.S. and Canadian-based OER makers. ... It can reasonably be assumed that a ‘fair use’ in the U.S. will be a ‘fair dealing’ in Canada” (Jacob et al., 2021, p. 20). However, while this foundational principle underlies the Canadian adaptation of the Code, in practice the process required much more than just the replacement of “fair use” references with “fair dealing.” Significant revisions to the original text were necessary in order to address the Canadian legislative and legal context, and to ensure that the Code was understandable and relevant to a Canadian audience.

As a result, the Canadian version of the Code is more than an adaptation; it is a new work that owes its underlying context and inspiration to the U.S. version. That said, many aspects of the original Code were not changed. The structure, formatting, and style were retained, and the two documents are similar in terms of purpose and scope. Also, the same four use cases, and their respective principles and considerations appear in both codes, as these were largely informed by the extensive consultation process carried out by the U.S. authors—the findings of which were equally relevant to OER creators on the Canadian side of the border. We also decided to forgo linking to relevant case law, as this was consistent with the approach used in the U.S. version and as including links to external sites creates challenges for those tasked with maintaining the accuracy and currency of the Code.

But it is there that the similarities end, as we found that while fair dealing and fair use share many commonalities, their legislative and judicial histories are distinct. It was not possible to effec-

tively discuss fair dealing best practices without grounding them in the context of the exception's evolutionary journey through Parliament and the courts. It therefore became necessary to create a number of entirely new sections in the Canadian adaptation in order to provide a more relevant frame of reference for the practices being described.

Some of the changes we made were straightforward; references to the U.S. *Copyright Act* were removed and replaced, if applicable, with comparable references to Canadian law. When U.S. examples were used to illustrate the Code's use cases, they were swapped out for references that were more meaningful in Canada. Terminology, both copyright- and OER-related, was updated to reflect common usage in the Canadian environment, and additional explanations of some terms were added. For example, we inserted definitions for the terms "openly licensed" and "copyright-protected" to ensure that they would have the intended meaning for a Canadian audience of OER practitioners; we also included an explanation of the difference between "attribution" and "citation," as this seemed to be a point of confusion for some readers. Another challenging term was "inserts," which is used in the U.S. Code to describe the portions of third-party works to be included in an OER. While this term is not commonly used in reference to fair dealing analyses in Canada (where the tendency is to refer to the "excerpt" from the original work), we ultimately opted to retain it as we felt it was the most appropriate descriptor to use in the context of OER creation.

On a broader scale, it was necessary to remove or completely rewrite explanations of copyright doctrines that were specific to the U.S. context. Concepts such as "transformative use," an essential component of a fair use assessment in the U.S. but one that does not feature prominently in Canadian law, required a rethinking of some of the principles and considerations in the Code's use cases. The process of evaluating the fairness of a use case also had to be reworked to reflect best practices established by the Canadian courts. An extensive section outlining fair dealing's history in Canada and a section on moral rights (addressed in Canadian law but not U.S.) were also added.

We also felt strongly that it was necessary to include a detailed explanation of the Supreme Court of Canada's two-step test for determining when a use is fair dealing (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004). The first step requires establishing that the purpose of the use is for one of the fair dealing purposes enumerated in the Act. The second step of the test determines whether the use in question is fair by evaluating the six factors with respect to the selected work: the purpose of the use, the character of the use, the amount used, the possibility of any alternatives to the use, the nature of the work being copied, and the effect of the use on the work. All of these factors must be considered but may not all be equally weighted, or even relevant, when applied to the use case in question. Therefore, not all six factors need to be "fair" in order for the use to be considered fair dealing, but they must be considered together to determine whether, on balance, the use is fair. Understanding of this foundational principle in Canadian copyright law, which has influenced many subsequent Canadian cases, is essential for anyone undertaking a fair dealing analysis. It also underpins the fair dealing evaluations described in each of the Code's four use cases.

Finally, the appendices, of which there were five in the U.S. Code, were reduced to three in the Canadian version. Some were removed as they were not needed, such as *Appendix Two: Fair Use Then and Now*, and *Appendix One: Background Findings*, which reported on the U.S. authors' consultations that informed the original Code. *Appendix Three: Educational Fair Dealing in Canada* (from the U.S. Code) became the first appendix in the Canadian version. It was updated to reflect recent developments in Canadian law and provides the underlying legal analysis for the Canadian version.

We also added a new appendix, *Indigenous Knowledge and Considerations for Inclusion in OER*, to address relevant considerations associated with copying Indigenous knowledge and other forms of cultural expression. The Canadian Copyright Act and Western intellectual property regimes fail to recognize Indigenous concepts of ownership and knowledge transfer. This highlights an inadequacy of the current legislation, as Indigenous knowledge and cultural expressions require distinct consideration outside standard copyright frameworks. The Appendix references the commitments made in the *UN Declaration on the Rights of Indigenous Peoples Act (UNDRIP)*, which became federal law in Canada on June 21, 2021 (UNDRIP, 2021). It is necessary to develop instruments in Canadian laws that specifically recognize and protect Indigenous knowledges, including traditional knowledges and reflect the objectives set out in *UNDRIP*. This appendix is not intended to be a policy statement or provide protocols; rather it raises ethical considerations for those wishing to use Indigenous knowledges in an OER. The authors of this Code gratefully acknowledge the guidance and contribution of Kayla Lar-Son, a Metis librarian originally from Treaty Six territory, Alberta, to this appendix.

### How Far to Push the Envelope?

Our adaptation also differed somewhat from its U.S. counterpart when it came to encouraging greater use of fair dealing by the OER community. As previously mentioned, the authors of the U.S. Code engaged in a rigorous consultation with OER practitioners from across the country, from both the K–12 and postsecondary sectors. These consultations revealed that OER creators and adaptors faced numerous obstacles, many of which involved issues of copyright. As noted in the U.S. Code:

We came away from our interviews with one overarching conclusion. Most professionals who work with OER often avoid relying on fair use in developing and deploying these learning materials despite recognizing that fair use could enhance their efforts. Participants cited various reasons: uncertainty about the doctrine, concerns about professional responsibility, and doubt about institutional support. (Jacob et al., 2021, p. 20)

The authors of the U.S. Code established a single clear objective as a result of these consultations: to persuade OER practitioners to overcome their reluctance to exercise fair use, thereby enabling the creation of more robust, effective, and inclusive OER. While we had a similar goal in mind, our adaptation was somewhat less vigorous in its advocacy and slightly more circumspect in its recommendations. We opted to rely on fair dealing best practices that were already well-established, noncontroversial, and generally universally supported in the Canadian educational environment. For situations that fell outside of these accepted norms, we avoided providing anything that might be construed as legal advice, instead urging OER creators to consult with their institutional copyright experts and/or legal counsel for guidance.

We also determined that some topics, relevant though they were to copyright and OER creation, were out of scope of the Canadian Code. As the focus of the adaptation was on the application of fair dealing in specific scenarios, we intentionally did not include any in-depth exploration of other exceptions in Canada's legislation. We did, however, adapt the section from the U.S. Code that described other copyright flexibilities that exist that may facilitate uses outside of fair dealing. We also chose not to discuss the role of licensing and its potential impact on the exercise of fair dealing (such as when contract terms negate fair dealing rights) and opted not to address the copyright considerations required when using openly licensed content in OER. In general, we felt these issues



were already effectively addressed in other venues and were tangential to the Code's primary goal of promoting a deeper understanding of fair dealing.

## Legal Review

Once the first draft of the Code had been completed, it was shared with our team of legal reviewers, Dr. Carys Craig, Dr. Lucie Guibault, and Michal Jaworski.<sup>2</sup> As a result of the recommendations, questions, and suggestions that our reviewers provided, we amended several sections of the Code. For the most part, the amendments related to aspects of the fair dealing evaluation process.

For example, our reviewers suggested adding "private study" to the list of potential fair dealing purposes that might be considered when incorporating copyright-protected inserts into an OER, rather than relying only on "education," "criticism," and "review." One reviewer pointed out that a notable Canadian Supreme Court decision supported a reading of "private study" that would extend to the provision of educational/classroom materials for that purpose (*Alberta [Education] v. Canadian Copyright Licensing Agency [Access Copyright]*, 2012). Also, as fair dealing for the purpose of education (added to Canada's Copyright Act in 2012) has been the subject of controversy, it seemed prudent to ensure that as wide a range of purposes as possible might be relied upon when assessing fair dealing in the context of OER creation.

Another recommendation that arose out of the legal review was the need for the Code to clearly distinguish between the purpose considered in Step 1 of a fair dealing assessment and the purpose considered as one of the six factors in Step 2. Step 1 involves deciding whether the activity falls within one of the purposes enumerated in Section 29 of the Copyright Act, while evaluating the purpose in Step 2 entails making an objective assessment of the user's real objective or motive for using the copyrighted work. The importance of making this distinction is that Canada's courts have affirmed that the fair dealing purposes in Step 1 are to be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained; however, the purpose in Step 2 may require a more nuanced and critical interpretation specific to the user and their proposed use. For example, at Step 1, an OER creator may decide that the inclusion of an insert falls under the category of criticism but determine in Step 2 that the real purpose or motive is to entertain or amuse readers rather than provide an objective analysis of the inserted content. The Step 2 purpose in this example may result in that factor tending to be unfair.

Our reviewers also felt that it was important to clarify whose perspective should be considered when determining the Step 2 purpose. Two recent Canadian court decisions made it clear that the predominant purpose that should be considered when assessing the goal or motive for the use in question was that of the end user (*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012; *York University v. Canadian Copyright Licensing Agency [Access Copyright]*, 2021). In the case of an OER, the end user will be the student who uses the work. However, the purpose of the copier (in this case the OER author) is not irrelevant. Ultimately, we felt that the purpose of the OER creator is unlikely to be substantially different from that of the student who makes use of it.

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<sup>2</sup> Dr. Carys Craig, Associate Dean (Research & Institutional Relations) and Associate Professor at Osgoode Hall Law School; Director of Osgoode's Law & Technology Program, IP Osgoode; Academic Director of Professional LLM Program in IP Law, York University. Dr. Lucie Guibault, Professor of Law, Associate Dean (Academic), Director, Law & Technology Institute, Dalhousie University. Michal Jaworski, Partner, Clark Wilson LLP; Co-Chair Clark Wilson Higher Learning Practice Group, Vancouver, B.C.

The legal reviewers made other recommendations that brought additional clarity and accuracy to the language of the Code. They made numerous suggestions for improving imprecise or ambiguous terminology and to ensure that the information provided was legally accurate. One area in which they suggested the language of the Code should be strengthened was regarding attribution of sources, particularly with respect to inserts used for the purpose of criticism and review, for which attribution is a legal requirement.

Lastly, we were urged to ensure that the Code promoted a holistic approach to conducting a fair dealing evaluation. The reviewers felt it was essential to make clear that the fairness determination requires balancing the fairness of all of the relevant factors in combination. With so much of the Code's guidance focused on the evaluation of individual factors, they felt it critical to ensure that evaluations do not just become a calculation based on the number of factors that weigh for or against a finding of fairness but are viewed as a multifactorial test that enables a holistic, nuanced assessment based on the circumstances at hand.

### **OER Practitioners' Review**

In addition to the legal review of the adapted Code, we also sought feedback on an early draft from a selection of OER practitioners. These were individuals from across Canada who were engaged in various aspects of creating, or supporting the creation of, OER. They included faculty members, OER librarians, experts from institutional teaching and learning centers, and others involved in OER advocacy.

The comments and suggestions received from the OER reviewers provided insight into some of the concerns of the OER community regarding fair dealing in particular, and copyright more generally. They also highlighted areas of the Code that needed further explanation, more supportive evidence, or restructuring in order to make the content more logical and relevant. Perhaps most importantly, it affirmed that there was a need for this kind of guidance in Canada's OER community and that the content of the Code had value and applicability to OER practitioners.

### **How to Use the Code**

The Code is meant to complement and expand upon the copyright information that OER authors may already have access to, either through what their institution provides or what they know about copyright generally. Fair dealing analyses are always a matter of fact and circumstance and take into consideration the individual aspects of a potential use and work. While best practices can be extremely useful, providing a shared baseline of understanding for a community of users and creators to build from, best practices cannot replace the need for individual fair dealing assessments. As a result, the Code, like fair dealing, is not prescriptive and does not provide bright-line rules about copying. Instead, "it lays out an analytical framework to understand how much of a work, up to or including the whole, is appropriate for a specific purpose, in light of the user's professional goals and other considerations" (Jacob et al., 2021, p. 9).

While a primary purpose of the Code is to provide a consistent approach to fair dealing analyses, in order to facilitate its usefulness, the core of the Code is presented as four distinct use cases. These use cases were identified by the creators of the U.S. Code as commonly "repeated scenarios" emerging out of their consultations with OER professionals (Jacob et al., 2021, p. 10). Each scenario is then broken down into four constituent parts, including a description, which outlines the proposed use case; the principle, which provides a summary of the most relevant fair dealing factors

and analysis alongside best practices for assessing fair dealing; considerations, which provide additional important contextual factors that may impact a fair dealing assessment; and finally, challenging cases, which serve to bring attention to some of the complexities associated with fair dealing analyses within an open environment. The scenarios provided should not be taken to represent the entirety of allowable use cases, but the principles and considerations should be understood as being transferable to new situations as they emerge.

In addition to providing practical examples in order to help contextualize fair dealing and provide a common basis for discussion and elaboration of analysis, our hope is that the Code emphasizes the importance of an OER author's professional judgment in assessing the fairness of a use in relation to the pedagogical goals of the OER. Purpose is at the core of any fair dealing analysis, and the OER author is best positioned to fully articulate their objectives in any copying activity. Centering the author also allows the Code to remain responsive to emerging best practices, professional standards, and technological innovations that may limit or permit new types of copying.

Finally, the legislative and judicial context that informs the Code is not static, and inevitably changes to the Copyright Act and case law will come to impact how fair dealing is understood in Canada. The Code attempts to remain flexible enough to allow for these shifting circumstances, but ultimately it may need revision in the future if it is to remain relevant to the community. This is one of the reasons that users of the Code are encouraged to liaise with their institutional copyright support services if available. We acknowledge that these institutional experts are best positioned to provide timely copyright information that reflects the unique context of an individual institution and local OER creator community.

Beyond the Code itself, the document contains several supplementary materials that serve to provide additional context and information for users. Contained within an introductory section and three appendices, this content enriches the Code and contains useful background knowledge that will help institutions, support staff, and OER creators better situate their work and copying practices within the broader legal context. Because these sections of the document go beyond the practical and creator-focused guidance offered in the core of the Code, they have been identified as such. We hope that this division of content will facilitate the document's usefulness for different parties and allow the Code to serve both as a useful guide for practitioners and a tool for OER facilitators on campus, should they want to include the document among their body of support and policy documentation.

### **Acknowledging Fair Dealing**

As discussed above, although the Code has been written as a guide primarily for OER authors, OER is purpose-built to be reused, remixed, and adapted by others. As a result, OER creators and the broader OER community are committed to providing clear and transparent attribution (source and creator) for any inserts they have included, to help guide any future adaptations and reuse of the work. This best practice aligns with already established expectations for academic citation and acknowledgment, although it is often above and beyond what is required by copyright law, which dictates that acknowledgment of the author and source is required when relying on fair dealing for the purpose of criticism, review, and news reporting, but not explicitly required for the remaining purposes.

The Code does not provide prescriptive guidance for how attributions for inserts copied under fair dealing should be presented, however, it is always advisable to include enough information for a user to locate the insert in its original place of publication. This practice closely aligns with what

Creative Commons and other open licensing schemas advocate for and includes title, author, and source.

### Adopting the Code

The Code is licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) license, thereby offering users the ability to freely share and adapt the work. It is available in both French and English and can be downloaded as a pdf or linked to directly through the version posted to Pressbooks, an online publishing platform. We made it available in Pressbooks so institutions could easily clone the work for revision and reuse. This removes barriers to use and maximizes a user's ability to adapt the work. Practitioners are encouraged to find content in the Code that addresses their circumstances, and sections from the Code can be effectively inserted into other works as references or examples.

Several institutions across Canada have adopted the Code in varying ways, each tailoring its application to fit their unique needs and workflows. For example, the Nova Scotia Community College (2025) provides a direct link to the Code, while Red Deer Polytechnic (2025) pays special attention to appendices that focus on specific issues such as licensing. The University of New Brunswick has integrated discussions of the Code into broader institutional reports and library guides, using the Code as an advocacy tool for promoting OER within its academic community. Douglas College links to the slides from the Code presentation at the 2024 ABC Copyright Conference in their OER and Fair Dealing Library guide page (2025). Simon Fraser University (SFU) has posted about the Code and highlights the four uses cases on their Scholarly Publishing blog, Radical Access (Shuttleworth & Zerkee, 2024). SFU also spotlights the Code on a copyright guidance webpage for their community but has added their own customized "Cautions and Challenges" note directed at their OER creators (Simon Fraser University Library, 2024). The University of Calgary has adopted the Code as a resource for OER creators and adapters (2025), the University of Alberta has included it as an OER information resource on its *Developing OER* copyright webpage (2025), and Toronto Metropolitan University has shared the resource internally with OER creators.

### Conclusion

When the working group embarked on the adaptation process, we did not anticipate that the project would take almost 3 years to complete. What seemed on the surface to be a straightforward reworking of the U.S. version of the Code turned out to be quite a complex and exacting undertaking. While all members of the working group are copyright specialists, some of whom also have extensive experience supporting the creation and adaptation of OER, we found the process of applying familiar fair dealing practices to issues in the OER realm to be particularly challenging, and sometimes controversial. While most fair dealing policies at Canadian educational institutions focus on its use in closed teaching and learning environments, OER are, by definition, openly available and widely disseminated, presenting a different set of considerations when evaluating the applicability of fair dealing. We also were reminded that, despite the commonalities shared with the U.S. fair use doctrine, significant differences exist between the two situations. As a result, we spent considerable time and effort addressing fair dealing's legislative and judicial history, as we felt that such context would be critical for an audience of Canadian users.

Ultimately, our working group's objective in undertaking the adaptation was to enable Canadian OER authors to create resources that were as dynamic, engaging, and pedagogically sound as possible. We recognized that the ability to draw on copyright-protected materials was necessary

for the creation of high-quality OER, and that being able to exercise fair dealing was often the key to enabling the incorporation of such materials. We were also acutely aware that OER practitioners face major impediments in this regard, including lack of information or mixed messaging about copyright, and uncertainty about their rights as users of copyright-protected works. Furthermore, we heard expressly from OER practitioners that there was an urgent need for clearly defined best practices in this area. By adapting the U.S. Code, we hoped to encourage Canadian OER creators to reconsider fair dealing as a legitimate option in the same way that the U.S. Code has championed fair use for its OER community.

While recognizing the importance of best practices as a way to engender a shared understanding of copyright in a user community, we also wished to empower individual OER authors to undertake (and feel confident undertaking) their own fair dealing assessments. Understanding that evaluating fair dealing requires a consideration of the facts and circumstances relevant to a particular use, we wanted the Code to center the OER author's professional expertise and judgment as the primary driver of the fair dealing analysis. It is the author, as the subject-matter expert and learning facilitator, who is best positioned to assess the fairness of a use in relation to the desired pedagogical outcomes of the OER.

We also wish to emphasize that the Code is intended to work alongside institutional copyright policies, not to supplant them. We encourage both formal and informal adoptions of this Code within and across institutions and call on the OER community at large to engage in conversations about it. In doing so, we hope the Code will help to move the needle a bit further in the direction of attaining a respectful balance between the rights of copyright owners and the user rights of those creating and benefitting from OER.



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