



Open Textbook Network

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**Fair Use
and OER**

**Strange
Bedfellows
or BFF's?**

What is Fair Use?



Fair Use

- Safety valve for free expression
- Equitable but codified in the statute
- The exceptional exception
- A positive right, not a “loophole” or concession by rightsholders



Four Statutory Factors

- (1) the **purpose and character** of the use;
- (2) the **nature** of the copyrighted work;
- (3) the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential **market** for or value of the copyrighted work.



Case Study: *Garfield Minus Garfield*

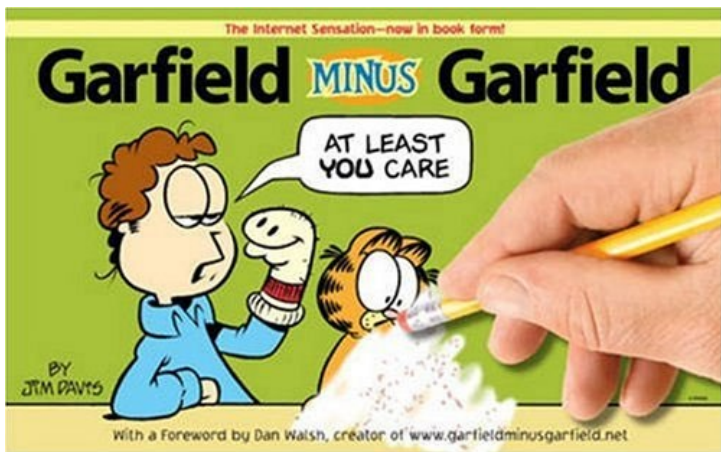
- Why
- What
- How Much
- A Substitute?



Who Cares?



Case Study: *Garfield Plus Fair Use*





Case Study: *Teaching During COVID*

- Why
- What
- How Much
- A Substitute?

Who Cares?

← Public Statement: Fair Use & Emergency Remote Teaching & Research

Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research

Share this page: <https://tinyurl.com/tvnty3a>
March 13, 2020

This *Statement* is meant to provide clarity for U.S. colleges and universities about how copyright law applies to the many facets of remote teaching and research in the wake of the COVID-19 outbreak. We write this as copyright specialists at colleges, universities, and other organizations supporting higher education in the U.S. and Canada who work every day with faculty, staff, and librarians to enable them to make ethical and legal choices about copyright issues in online teaching.

The United States is in a time of crisis. As of this writing, more than 200 universities and colleges have moved to remote teaching. These moves aim to promote public health by slowing the spread of the disease, while maintaining at least some of the important functions higher education plays in teaching, learning, and research. We have heard concerns that copyright may pose impediments to a rapid shift to remote instruction, or conversely, that copyright is not relevant. While legal obligations do not automatically dissolve in the face of a public health crisis, U.S. copyright law is, thankfully, well equipped to provide the flexibility necessary for the vast majority of remote learning needed at this time.

Fair Use

Copyright law in the United States is made to support teaching, research, and learning. This stems from its Constitutional purpose, which is "to promote the Progress of Science and the useful Arts."^[1] One critical feature of copyright law is fair use,^[2] a flexible users' right that allows the use of copyrighted works without permission. It accommodates a wide variety of circumstances, including new and rapidly evolving situations. In the words of one of our colleagues, April Hathcock, "fair use is made for just these kinds of contingencies."

To analyze whether a particular use is fair, courts balance four factors. The "heart of the fair use inquiry" lies in the first factor – the purpose and character of the use.^[3] Courts favor uses where the purpose is to benefit the public, even when that benefit is not "direct or tangible."^[4]

Even under normal circumstances, courts favor educational uses because of their broad public benefits.^[5] While there are no fair use cases squarely addressing copying to help minimize a public health crisis, the other wide variety of public benefits cited by courts leads us to believe that this purpose would weigh extremely heavily in favor of fair use. For example, in the *Authors Guild v. HathiTrust* case,^[6] the court made it clear that providing access to persons with disabilities was a strong public interest that weighed heavily in the fair use assessment. Similarly, other courts have found that allowing reproduction of the Zapruder film documenting Kennedy's assassination was in the public interest,^[7] and allowing redistribution of leaked internal memos about problems with electronic voting machines also favored fair use.^[8]

<https://tinyurl.com/tvnty3a>



Transformation: *Two core Q's*



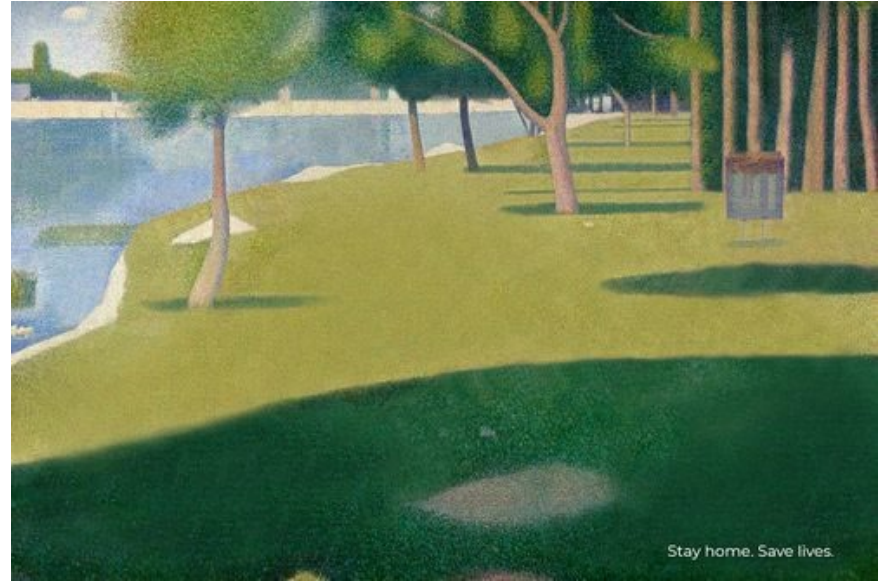
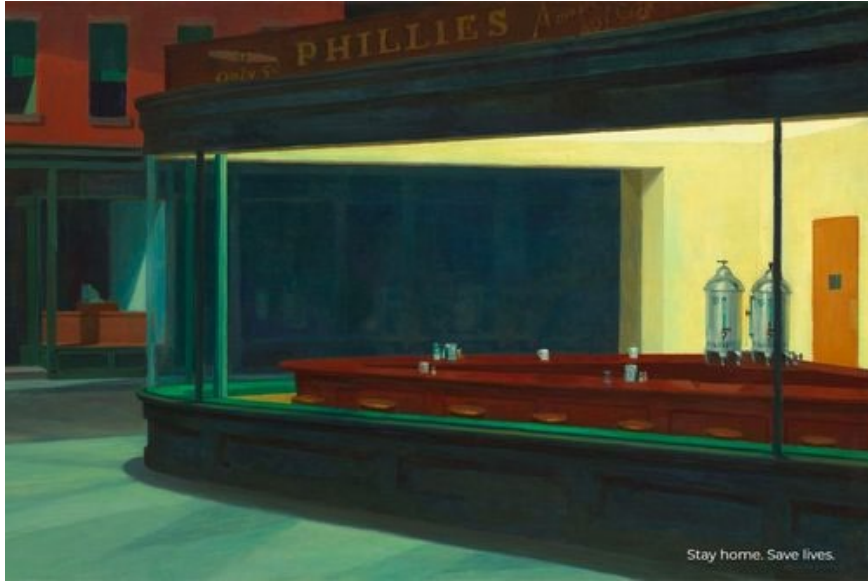
“whether the new work merely supersedes the original creation, or instead **adds something new**, altering the first with new **expression, meaning, or message**”

+

“quantity and value of the materials used are **reasonable in relation to the purpose** of the copying”

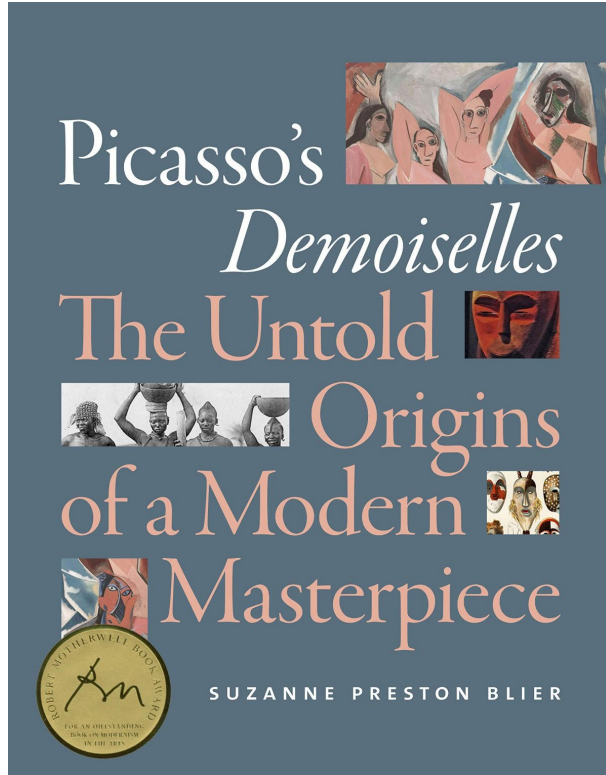


Transformative Use





Transformative Use



“The difficulties of publishing about Picasso has been manifested in how little publishing was being done, and how scarce the images were in that work. There have been few heavily illustrated books about Picasso, except by wealthy individuals or museums in relation to an exhibition.”

-Dr Suzanne Preston Blier

Code of
Best Practices
in Fair Use
for the
Visual Arts

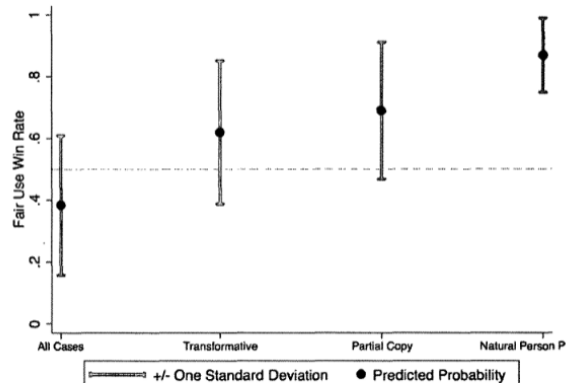
COLLEGE ART ASSOCIATION



Flexible but quite reliable

- Fact-specific
- One of the most consistent exceptions in the past 25 years
- Backstopped by “good faith” protections

Figure 4: Cumulative Predicted Probability of a Fair Use Win



Source: OLS regression 5, *infra* Statistical Appendix, Table 2. N = 222. The factors are cumulative, such that the “Partial Copy” includes Transformative, and “Natural Person P” includes Transformative and Partial Copy.

Matthew Sag, *Predicting Fair Use*, 73
OHIO ST.L.J. 47 (2012)

Fair Use in Education and Publishing



Fair Use Loves Education

Law cites “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”



["Students in class"](#) by [UGA CAES/Extension](#) is licensed under [CC BY-NC 2.0](#)



Case Study: *Bill Graham Archives v. DK*

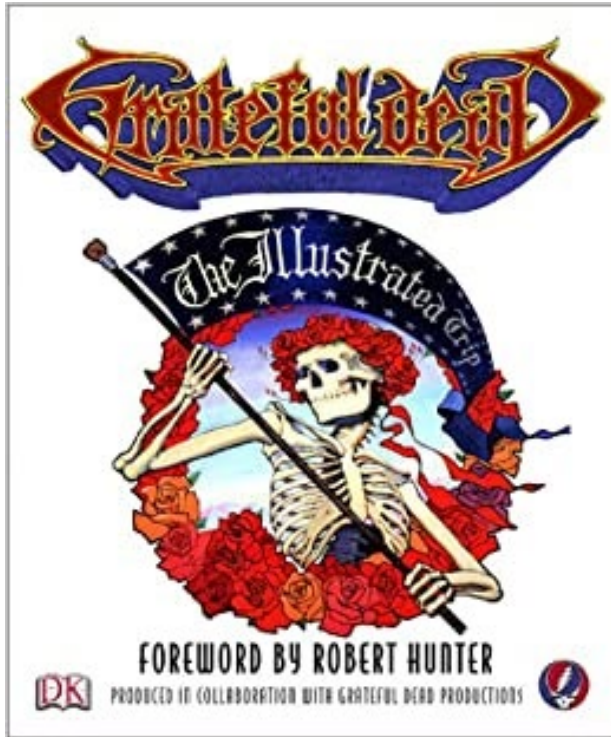


Image credit: Amazon.com

1. Transformative use! Taking an artistic work and putting it in the context of history.
2. Artistic works often receive more protection, but this has minimal impact with transformative uses.
3. Used the whole entire work, but was appropriate. Minimal image size helped too.
4. Due to the transformative nature of the use, BGA does not suffer market harm due to loss of license fee!



Case Study: *Authors Guild, Inc. v. HathiTrust*

1. Transformative uses! Word searches and access for those with disabilities
2. Variety of valuable works, but transformative nature of uses reduces impact of this factor
3. Scanning of both text and images was needed for searches and text-to-speech function
4. Given lack of market for accessible copies, there is little market harm



Image credit: hathitrust.org



Case Study: *Warner Bros.*

Entertainment Inc. v. RDR Books

1. As a reference work, purpose is somewhat transformative, but not consistently transformative
2. Lots of copyright protection here!
3. Given the nature of the Lexicon, copying was needed, but in some places it was excessive
4. Lexicon itself is a reference work, not a derivative, nor is it likely to substitute for purchase of novels, but could for companion works or other derivatives! Others should not be able to take content wholesale without other considerations for original intent of the law.



What can we do?



["stack of colorful wooden building blocks"](#) by [CraigTaylor74](#) is licensed under [CC BY-NC-SA 2.0](#)

Make thoughtful determinations about:

- Substitution vs. Transformation
- Decoration vs. Enhancement of Material/Learning Experience

How Fair Use Fits with OER



Case Study

- Public community college
- Science of Sleep textbook, 140 images
- [Sleeping sperm whales](#)
- NatGeo phone statement on Fair Use
- Can we use the image???

Thanks to Stéphane Granzotto



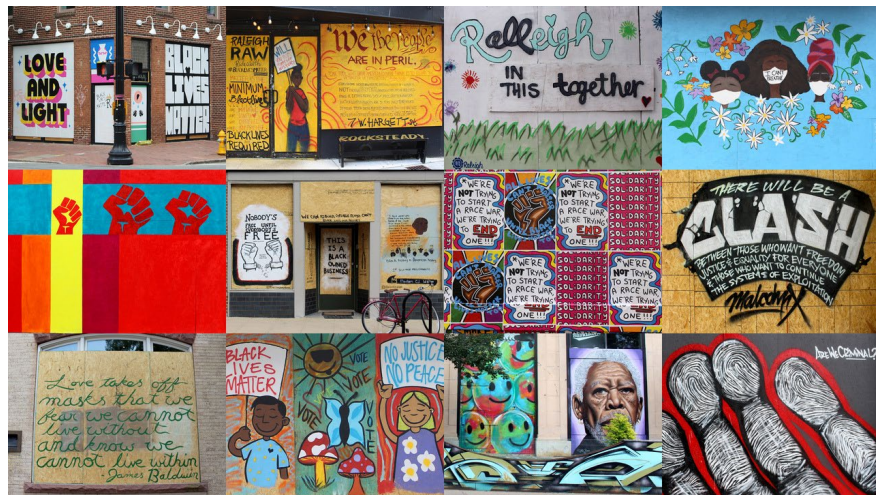


Building OER

- We already rely on fair use a lot
- So do most publishers - if we abandon fair use we make it likely that OER will be of lower quality than commercial resources
- It's not too hard:
https://wiki.creativecommons.org/wiki/Marking_Creators/Marking_third_party_content



Most people's lived experiences don't come with a CC BY license



Phoebe Ayers
@phoebe_ayers

You want to know something depressing? As far as I can tell we don't have any pictures from protests in any of the "A" states on Wikimedia Commons - Alabama, Arkansas, Arizona, Alaska, all missing. Anyone have photos you are willing to open license?



Phoebe Ayers @phoebe_ayers · May 30

If you have #GeorgeFloydprotest pictures from anywhere in the country that you'd be willing to open license for Wikipedia - please upload them to Wikimedia Commons. I can help with how to do it.

[Show this thread](#)

10:44 PM · Jun 16, 2020 · [Twitter Web App](#)



Downstream Uses

- Fair use runs under each CC license and can be considered when a downstream use exceeds the scope of them
- Fair use can also be considered for works used with permission or under a license in OER



["Running Stream-01+"](#) by [Sheba](#) Also [17.5 Mil + views](#) is licensed under [CC BY-SA 2.0](#)



Common Concerns

- It's so vague!
- I'm going to get sued!
- Communicating that users need to make their own fair use determinations



We have some experience with this too!



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Mythbusting

- “Educational use is always fair use”
- “Commercial use is never fair use”
- “If I only use 30 seconds or 10% it’s always fair use”
- “Fair use makes international adoption impossible”
- “If the rightsholder offers a license, it can’t be fair use”
- If the rightsholder denies me permission or we reject their license offer, then fair use can’t be considered”
- “Since we can’t know for sure, fair use is nothing more than ‘the right to hire lawyer’”



Red Flags

- Uses that act as a substitute
 - Building textbooks with textbooks
 - Using unlicensed stock photos
- Uses that are decorative or clearly disproportionate
 - Ornamental cover images
 - Copying for convenience

How Can a Best Practice Document Help?



Best Practices for . . .

Codes of Best Practices

<p>Code of Best Practices in Fair Use for Software Preservation</p> <p>Read More</p>	<p>Fair Use and Sound Recordings: Lessons from Community Practice</p> <p>Read More</p>	<p>SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM</p> <p>Set of Principles in Fair Use for Journalism</p> <p>Journalists have created a set of principles that allows them to stay interesting, but possible to obtain.</p> <p>Read More</p>
<p>Code of Best Practices in Fair Use for Online Video</p> <p>Code of Best Practices in Fair Use for Online Video</p> <p>This code of best practices is intended for users of content that is available online. It is intended to provide guidance for users of content that is available online. It is intended to provide guidance for users of content that is available online.</p> <p>Read More</p>	<p>Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing</p> <p>This Statement of Best Practices identifies what media scholars consider to be fair use of copyrighted media within media studies publishing.</p> <p>Read More</p>	<p>Society for Cinema and Media Studies' Statement of Fair Use Best Practices in Fair Use in Teaching for Film and Media Educators</p> <p>This code of best practices is intended for teaching for film and media education. It is intended to provide guidance for users of content that is available online.</p> <p>Read More</p>
<p>Statement on the Fair Use of Images for Teaching, Research, and Study</p> <p>This Statement will describe the need for professionals working with image resources to have best practices regarding their use.</p> <p>Read More</p>	<p>FAIR USE FOR SCHOLARLY RESEARCH IN COMMUNICATION</p> <p>Code of Best Practices in Fair Use for Scholarly Research in Communication</p> <p>This code identifies the situations that represent the current consensus within the community of communication scholars about appropriate questions for the fair use of copyrighted materials.</p> <p>Read More</p>	<p>IN FAIR USE OF COLLECTIONS CONTAINING ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER</p> <p>Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions</p> <p>Memory institutions serve an essential role in society. They are responsible for the preservation of the world's cultural, historical, and scientific records.</p> <p>Read More</p>

Codes of Best Practices

<p>CODE OF BEST PRACTICES IN FAIR USE FOR POETRY</p> <p>Code of Best Practices in Fair Use for Poetry</p> <p>This code of best practices helps poets, publishers, and others who are interested in the right to create, teach, and use copyrighted material in poetry. To create this code, poets came together to articulate...</p> <p>Read More</p>	<p>STATEMENT OF BEST PRACTICES IN FAIR USE OF DANCE-RELATED</p> <p>Statement of Best Practices in Fair Use of Dance-Related Materials</p> <p>Published by the Dance Heritage Coalition, this code identifies other libraries, archives, centers, and others working with dance-related materials. It is intended to provide guidance for users of content that is available online.</p> <p>Read More</p>	<p>Code of Best Practices in Fair Use for OpenCourseWare</p> <p>Code of Best Practices in Fair Use for OpenCourseWare</p> <p>Read More</p>
<p>CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION</p> <p>Code of Best Practices in Fair Use for Media Literacy Education</p> <p>Read More</p>	<p>CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES</p> <p>Code of Best Practices in Fair Use for Academic and Research Libraries</p> <p>This code of best practices is intended to provide guidance for users of content that is available online. It is intended to provide guidance for users of content that is available online.</p> <p>Read More</p>	<p>Code of Best Practices in Fair Use for the Visual Arts</p> <p>Code of Best Practices in Fair Use for the Visual Arts</p> <p>This code of best practices is intended to provide guidance for users of content that is available online. It is intended to provide guidance for users of content that is available online.</p> <p>Read More</p>
<p>Documentary Filmmakers' Statement of Best Practices in Fair Use</p> <p>This Statement of Best Practices in Fair Use makes clear what documentary filmmakers normally regard as a reasonable application of the copyright law's limitations. Fair use requires the user to...</p> <p>Read More</p>		



Best Practices for OER/OEP

Overview: Fair Use and Open Educational Resources

This project aims to evaluate the perception of copyright related barriers to the creation of open educational resources (OER) that contain third party materials, such as quotations, excerpts, photographs and illustrations. Our preliminary discussions indicate that there are significant areas of practice where increased understanding and confidence about when and how fair use permits the use of these third party materials would expand the types of OER created and improve their instructional value. We anticipate working with authors, teachers, professors, instructional designers, librarians, and others to draft a best practices in fair use for open educational resources to document the best practices in this professional community.



Open Educational Resources



Best Practices for OER/OEP

Resilient Digital Materials for Teaching and Learning: Copyright and Open Education Strategies Webinar Series

As teachers are making an emergency shift to online education, one component of that struggle is navigating concerns around copyright when finding digital teaching materials. This webinar series addresses that and is divided into two tracks: K-12 and Higher Education. There are also two stand-alone webinar options that can be attended by both the K-12 and Higher Education community. All of the webinars will also be available on YouTube and linked to this page after the live event has ended.

DATE	TITLE	RECORDING	SLIDES
March 31, 2020 01:00 PM ET	Reading Aloud: Fair Use Enables Translating Classroom Practices to Online Learning	View on YouTube	View Presentation
Apr 14, 2020 01:00 PM ET	Essential copyright knowledge: a toolkit for teachers and librarians	View on YouTube	View Presentation
April 17, 03:00 PM ET	Educational fair use in the COVID-19 emergency: yes you can scan (and more) for K-12 education	View on YouTube	View Presentation
April 17, 03:00 PM ET	Educational fair use in the COVID-19 emergency: yes you can scan (and more) for colleges and universities	View on YouTube	View Presentation
April 24, 12:00 PM ET	Finding teaching materials for Fall 2020 and beyond: evaluating resilient digital teaching and learning materials from open and commercial sources for K-12 teaching	View on YouTube	View Presentation

Putting It All Together

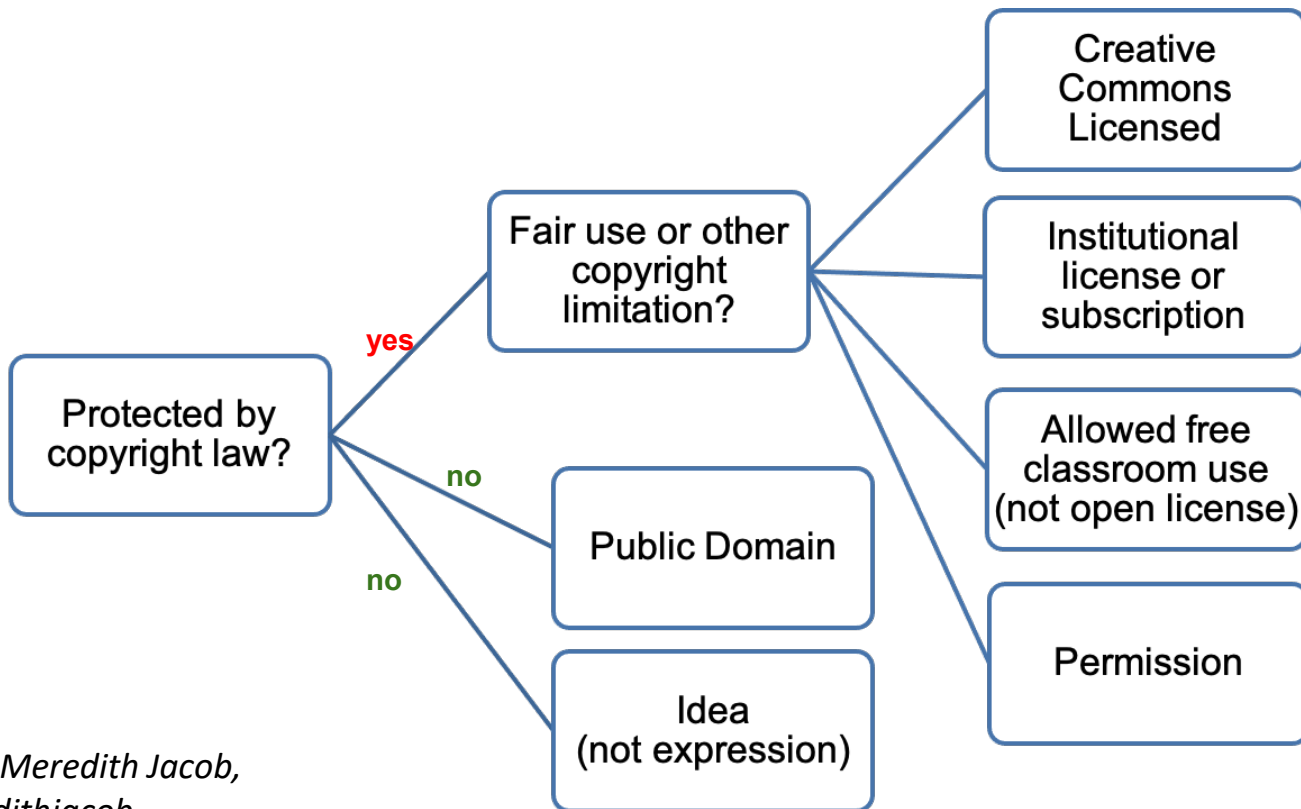


It's all about the options!

- Creating our own content
- Using public domain works
- Using openly licensed works
- Fair use
- Obtaining permission or a license for our use



It's all about the options!



Source: Meredith Jacob,
@meredithjacob



Which will you choose?!

- Make thoughtful decisions
- Work with administrators and your institution's attorneys
- Remember the mission!

Questions and Discussion



Thanks!

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