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Code of Best Practices in Fair Use for OpenCourseWare

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Code of Best Practices in Fair Use for OpenCourseWare

BY
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WHAT THIS IS

This document is a code of best practices designed to help those preparing OpenCourseWare (OCW) to interpret and apply fair use under United States copyright law. The OCW movement, which is part of the larger Open Educational Resources (OER) movement, was pioneered in 2002, when the Massachusetts Institute of Technology launched its OpenCourseWare initiative, making course materials available in digital form on a free and open basis to all. In 2005, MIT helped to organize with the support of the William and Flora Hewlett Foundation a group of not-for-profit organizations interested in following the OpenCourseWare model and standardizing the delivery of OCW material. This group of institutions, known as the OCW Consortium (OCWC), has grown into a concern of more than 200 universities worldwide promoting universal access to knowledge on a nonprofit basis. The mission of OCWC is "to advance formal and informal learning through the worldwide sharing and use of free, open, high-quality educational materials organized as courses."

Providers of OCW are an essential part of the larger Open Educational Resources (OER) movement, dedicated to providing high-quality digitized educational materials, tools, and implementation resources offered freely and openly for anyone with access to the Internet. (For more information, consult http://www.hewlett.org/oer.) This movement and the dissemination of OCW material often depend upon Creative Commons licenses (creativecommons.org) in order to make materials as widely available as possible to public- access users.

OCW materials often, where possible, integrate third-party materials. Incorporating such material frequently presents significant challenges. Under certain circumstances, those producing OCW will be required to secure permission from copyright owners and "clear the rights" in order to proceed with the intended use. The process of securing permissions or licenses from copyright owners is rarely an easy, inexpensive, certain, or straightforward enterprise. Fortunately, there are instances under U.S. copyright law where rights clearance is not necessary. Fair use is one such instance. Fair use is the right to use copyrighted material without permission or payment under some circumstances—especially when the cultural or social benefits of the use are predominant. It is a general right that may apply even in situations where the law provides no specific authorization for the use in question.

This is a guide to current best practices for the use of copyright material in OCW, drawing on the actual activities of educators and educational staff who prepare courses for distribution.

WHAT THIS ISN'T

This code of best practices does not tell you the limits of the fair use rights of OCW makers. Instead, it describes how those rights apply in certain recurrent situations.

It is not a guide to using material pursuant to licensing agreements because such works are subject to contractual limitations that have been agreed to, so they can be used the way the owners say they can. Whether a specific license authorizes the use of material in an OCW setting (as distinct from a closed academic one) will thus depend on the terms of that agreement. Where a license does not explicitly authorize the inclusion of content in OCW, fair use may be an option. However, many licensing agreements place limits on fair use. A lively debate is under way among copyright academics about whether such terms are binding and enforceable, but court decisions to date give scant indication that the fair use principle will prevail. Notably, however, Creative Commons licenses make clear that when an OCW provider is relying on fair use, license conditions do not apply because the use is authorized by law. Thus, a Creative Commons license does not interfere with a user's ability to rely on fair use.

This is also not a guide to material that is already free to use without considering copyright. For instance, all federal government works are in the public domain, as are many older works. For more information on such "free use," consult the document "Yes, You Can!" (centerforsocialmedia.org/files/pdf/free_use.pdf and www.copyright.cornell.edu/resources/publicdomain.cfm).

It is not a guide that addresses directly the use of material that someone wants to license but cannot trace back to an owner—the so-called "orphan works" problem. However, fair use does apply to orphan works on the same terms as works with known copyright owners. Thus, in those situations the principles stated in this document will be relevant.

Finally, this guide is legal information and not legal advice. Readers who want to know how its principles apply to their own circumstances, or how the law has evolved since this document was created, may wish to consult an attorney.

HOW THIS DOCUMENT WAS CREATED

This code of best practices was drafted with input from representatives of seven OCW producers—Johns Hopkins School of Public Health, Massachusetts Institute of Technology, Notre Dame University, Tufts University, University of California at Berkeley, University of Michigan, and ccLearn, the education division of Creative Commons—as well as by representatives from Yale University. It was grounded in interviews with 23 OCW makers at 18 U.S. institutions.

The drafting process was initiated by Sheree Carter-Galvan at Yale University (associate general counsel) and led by Lindsey Weeramuni of MIT (intellectual property supervisor: MIT OpenCourseWare) and coordinated by Profs. Peter Jaszi (Program on Information Justice and Intellectual Property, Washington College of Law, American University) and Patricia Aufderheide (Center for Social Media, School of Communication, American University). The code of best practices was reviewed by a committee of legal scholars and lawyers expert in copyright and fair use. (Consult end of document for complete list.)

OCW AND THIRD-PARTY RIGHTS

As the OER movement has grown, the problem of using copyrighted material has proliferated. References to and especially quotations from others' copyrighted materials inhere in most scholarly materials, including teaching materials. They occur throughout the curriculum, from the arts and humanities to the sciences, technology, engineering, and mathematics. In order to incorporate this material, OCW makers must decide whether to rely on a license (whether open or restricted) or to employ fair use if relevant licensing terms do not prevent it. If these options are not available, they may decide to replace, delete, or obscure the material.

Until now, it has been difficult for OCW makers and their institutions to be confident in employing fair use, because there is no direct legal precedent clarifying the applicability of fair use to the practice. This has resulted in expending time and resources licensing material that does not need to be licensed, or alternatively, in weakening the educational quality of OCW by the precautionary removal of third-party copyrighted material.

FAIR USE

The idea of "openness" that animates the preparation of open courseware begins with a commitment to making educational materials available to the members of the public, not just to students formally enrolled in specific institutions. The Copyright Act is particularly solicitous of unlicensed educational uses in the classroom (as reflected in 17 U.S.C. Sec. 110), and there were even attempts (however inadequate) to update these provisions for distance education in the so-called TEACH Act of 2002. But where online educational activities like OCW are concerned, providers must look for support to the fair use doctrine—which singles out "teaching" as one example of the activities it exists to support.

Fair use is the right to use copyrighted material without permission or payment, when the benefit to society is larger than the damage to the copyright holder. It is an essential part of copyright policy in the United States, where the purpose of copyright is to promote the progress through the creation of culture—"science and the useful arts." Given that goal, our law values all methods that help create culture, including those that enable people to make new culture by using existing culture in new ways. Among these, of course, educational activities figure prominently.

Fair use also is rooted in the First Amendment. As is true of the exercise of expressive freedom in other speech settings, taking advantage of fair use in education depends on the application of general principles to specific situations. "Bright line" tests and "rules of thumb" are not appropriate to fair use analysis, which requires case-by-case determinations made through reasoning about how and why a new use recontextualizes existing material. The Congress provided some general guidance in the four factor test in Sec 107 of the 1976 Copyright Act.[1] Since then, two common questions have emerged from the case law as core guiding principles for fair use reasoning in situations like those most commonly presented by OCW, where material originally created with other goals in mind is being quoted in an educational setting:

1. **Is the re-use "transformative"— that is, does it add value to and repurpose preexisting material for a new audience?**
2. **Is the amount of material taken appropriate to the re-use?**

Many OCW products that appropriately incorporate preexisting content are poised to fare well when these questions are applied to them. In addition, it is worth noting that even nontransformative uses can be fair—especially nonprofit educational ones that don't cut into the earnings of copyright owners. In this context, it may be important (although not determinative) whether the source of the repurposed material can be ascertained and whether the material is being actively exploited by its owner. If the answer to either of these subsidiary questions is "no," fair use is more likely to apply than otherwise.

Fair use is not platform specific. In other words, a fair educational use of preexisting material will remain so, if fair use values are maintained, when material that originally appeared online is downloaded for use in hard copy or on digital media.

Fair use sometimes is referred to as an "equitable rule of reason." Since fair use was first recognized in 1841, courts have deferred to custom and practice within use communities where there was clear evidence of it. Various information industries (trade publishing and broadcasting, for example) have noted this fact and created their own internal "standards and practices" for fair use.

Large corporate copyright owners have denigrated fair use as part of their struggle against "piracy"—occurring just when the doctrine is enjoying the broadest judicial recognition since its inception. Ironically, some public interest copyright advocates also have inadvertently contributed to the undermining of confidence in fair use. As a consequence, many people who regularly need third-party material in their work are confused and anxious about their ability to rely on fair use and unnecessarily suspicious about its ultimate utility.

In response, creative communities have assembled to develop norms interpreting fair use. There is nothing new in this approach; for example, broadcast news producers, have long depended upon such interpretive documents as standards and practices guides for TV networks to support their ubiquitous employment of fair use. Recently, codes of best practices in fair use have been developed by documentary filmmakers, dance archivists, film scholars, and media literacy teachers. Such codes can have a dramatic effect, creating new opportunities for both creation and circulation of new content. For instance, after some 15 years of refusing to accept

fair use claims for coverage, with the introduction of the *Documentary Filmmakers' Statement of Best Practices in Fair Use,* all errors and omissions insurers now routinely accept documentary filmmakers' fair use claims. Even more to the point, films are being made today, in reliance on fair use, which would have been literally impossible to produce five years ago.

The code set forth below was crafted with the goal of open education in mind and in recognition that the scope of fair use in the classroom or behind a university's firewall is likely broader than it is when materials are placed on the publicly accessible Internet because the risks to the copyright owner's interests differ. On the other hand, the code also reflects OCW providers' strongly shared convictions that they serve a universe of users who would not otherwise have access to educational materials and that the limited and integrated uses they make of copyrighted content in preparing those materials are fundamentally and inherently transformative.

COMMON COPYRIGHT CONFUSIONS IN OCW

OCW makers commonly confront copyright problems in their daily work. Interviews that were conducted in connection with creating this code reflect a high level of sophistication. At the same time, they also revealed some common misunderstandings:

- **Confusion of copyright and trademark**
  Some OCW makers expressed concern about showing corporate brand names and symbols in OCW.
  The reality: In general, re-use of commercial identifiers is not regulated by copyright law. Instead, trademark law applies—and it teaches that educational uses of trademarks and trade names simply are not actionable where such uses do not mislead or confuse consumers about the source of a good or service, and do not constitute libel or product disparagement. So there is no need to "blur" out brand names in images or substitute generic designations (ibuprofen for Motrin) in text.

- **Overly conservative analysis**
  OCW makers are often hesitant to include public domain works that have been digitized by others, for fear that the process may create new copyrights.
  The reality: The few judicial interpretations of U.S. copyright law that bear on

the question of whether preparing such digitized versions (scans of pages in old manuscripts, for example) would be considered sufficiently "original" to merit protection indicate the contrary (as does as the preponderance of academic commentary). There is little indication anywhere in the world that simple scans would be protected under national laws (any more than would photocopies).

- **Overstatement of copyright's implications for the liability of OCW providers**
  Some OCW makers were concerned that they might be legally responsible for public-access uses made of materials they provide.
  The reality: OCW generally can be distributed safely despite such concerns about so-called "secondary liability." United States law requires something more than providing copyrighted materials to another before declaring the activity to be unlawful. Cautious providers may wish to package OCW with an admonition that it is intended only for lawful, noncommercial educational uses. But they will not be legally responsible for public-access uses unless they encourage unlawful uses, have advance knowledge that materials will be misused, or receive a direct financial benefit from such misuse.

- **Understatement of copyright's reach**
  A few OCR makers evidently believed that they could safely substitute materials found on the Web for content that raised copyright issues.
  The reality: Much online material is copyright protected. Thus, for example, the presence of music snippets on Amazon.com indicates only that they have been made available for a specific use; they are no less (or more) subject to copyright protection than equivalent passages gleaned from commercial recordings in other formats.

- **Lack of awareness about the how the intensity of copyright protection varies**
  Many users believe that all copyrights are of equivalent strength and scope.
  The reality: So-called "fact-intensive" works (a category including tables and charts that display scientific or historical data, technical photographs, etc.) receive "thinner" protection than do "creative" ones (films, poetry, etc.). This disparity in treatment reflects the different levels of "original authorship" that various kinds of works reflect. One can often avoid "thin" copyrights altogether

by extracting the unprotected factual information or making changes to the presentation format. In addition, this distinction significantly affects "fair use," which applies even more broadly to works of the former group than to those of the latter. Thus, excerpts from fact-intensive works can be used fairly in a wider variety of contexts than more creative ones.

- **Mis-estimating the scope of fair use**
  A common misunderstanding is that fair use applies differently depending on whether text or music is involved, or whether the material is in analog or digital format. Another is that fair use applies automatically to all core nonprofit educational activities, but not to commercial ones.
  The reality: Fair use applies across the board to materials of different genres in different formats. Commercial uses can be fair ones, but (by the same token) not all educational uses will qualify. In each case, the user needs to analyze the proposed use according to the considerations outlined below.

FAIR USE VALUES INTERNATIONALLY: "LIMITATIONS AND EXCEPTIONS"

The preference for educational uses in copyright policy is not a U.S. specialty by any means. In fact, fair use is part of an international family of "limitations and exceptions" on copyright provided under national laws, all of which make provision (though in somewhat different terms) for unlicensed educational uses. Almost all foreign copyright laws provide private use exceptions that benefit individual students, and many also include specific educational use exceptions that shelter providers of learning materials from liability. Thus, for example, Article 5(3) of the 2001 European Union Directive on "The harmonisation of certain aspects of copyright and related rights in the information society" specifically permits exceptions covering use for "the sole purpose of illustration for teaching or scientific research" and "quotations for purposes such as criticism or reviews," so long as the extent of the use is appropriate to the purpose to be achieved and as long as the source, including the author's name, is indicated, unless this proves impossible. In addition to specific educational and quotation exemptions, many countries have specific copyright exceptions for incidental use (topics addressed in the United States only through the general fair use doctrine).

Copyrights are protected across national boundaries by international agreements. But OCW makers need to be concerned with the law of the country in which they produce their work, rather than that of the country where copyrighted material originates. In other words, U.S.-based makers can rely on fair use in considering how to employ material from a French work, even though France doesn't recognize our fair use doctrine. This code is concerned with fair use in the United States, and international OCW makers should consult the limitations and exceptions that apply in other countries.

UTILITY OF LABELING FAIRLY USED MATERIAL

Before considering *when* quotations from copyrighted works in OCW are fair, a word is in order about what such a determination might imply. Most obviously, of course, a U.S. provider of OCW would be free to use the material in question in the selected context. The drafters of this code believe, however, that a provider's right to use others' copyrighted content implies certain responsibilities, including duties to (1) attribute third-party material whenever reasoably possible and (2) use labeling conventions to notify public-access users when the OCW provider is relying on fair use. Such labeling would permit follow-on users to make informed judgments about what elements of an OCW offering they have a reasonable basis for reproducing or adapting. In the United States the fair use rationale for the initial use generally will apply to subsequent noncommercial educational uses of the material as well. Elsewhere, however, users will need to determine how the educational exemptions in their own national laws would apply.

Code of Best Practices in Fair Use for OpenCourseWare

This section describes a number of common, recurrent situations in which OCW providers may be concerned about whether or not to incorporate preexisting content into learning materials. It reflects the shared views of OCW professionals about when and how fair use should apply to their activities.

Note that certain uses may fall into more than one of the categories listed below. In each instance, it is assumed that, *in fact,* the content in question actually does enjoy copyright protection.

It also is assumed that the material in question was not obtained under a license that limits fair use, whether in specific terms or by way of language that restricts the licensee to specific kinds of uses recited in the licensing agreements. Unfortunately, such terms are relatively common in institutional subscriptions to data bases and other electronic information resources, and OCW makers should be aware of them.

COPYRIGHTED MATERIAL APPEARING INCIDENTALLY

SITUATION: The copyrighted material is inextricably linked to or juxtaposed with content included in an OCW offering, or simply appears in the background. For instance, a professor may comment on social implications of celebrity fashion as portrayed in a music video which also includes other copyrighted content, or a classroom where a lecture is videoed may have copyrighted material on posters in the background.

PRINCIPLE: In an environment where copyright extends to so many kinds of information, some incidental copying is unavoidable. Copyrighted material that is incorporated in this manner is being used for purposes very different from those intended by its creators. Where incidental use cannot be avoided with reasonable effort, or without detracting from the educational experience, it should be considered fair.

LIMITATIONS: In considering incidental fair use in educational settings, the interests of private rights holders must be balanced against the needs of teachers and learners.

- Video recordings of lectures for OCW should avoid focusing on extraneous copyrighted material whenever possible.
- Reasonable consideration should be given to removing incidentally captured copyrighted material from OCW material where such avoidance or removal will not detract from the educational experience.
- Reasonable measures also should be employed to minimize the amount or duration of incidental copying where it has not been eliminated; and where incidentally captured copyrighted material can be identified and attributed with reasonable effort, it should be so attributed.

CRITIQUE AND ANALYSIS

SITUATION: Copyrighted texts, images, or sounds are being scrutinized. These materials, in other words, are literally the subject of the course, rather than useful or incidental adjuncts to it or even examples or illustrations of the subject matter. The principle stated below applies to all kinds of courses in the humanities and sciences. Film studies, music literature, sociology and other courses that reference popular culture are particularly likely places for copyrighted material to be critiqued and analyzed.

PRINCIPLE: The investigation of preexisting works of authorship is an essential part of education, freedom of inquiry, and freedom of expression. Thus, this is a core example of fair use. Whatever the original informative or entertainment purpose that underlay the creation of the copyrighted material, it is being repurposed here as an object of commentary or other related discourse. This use of preexisting information or entertainment materials is a classic mode of advancing learning in the conventional face-to-face classroom, and it should be equally available in any OCW.

LIMITATIONS: Because the fair use status of third-party material used for critique, analysis, or both depends in part on the critical value added by the creator of the OCW materials, certain considerations should be borne in mind.

- Although commentary can be negative or positive, and express or implied, the purposes for which the copyrighted material has been incorporated should be reasonably clear, and to the extent possible, the commentary should be integrated with the copyrighted material.
- Wherever possible, incorporated material should be drawn from primary sources.
- The extent of the use should be no more than is reasonably needed for the critical purpose.
- Copyrighted material used pursuant to fair use should be attributed where reasonably possible.

COPYRIGHTED MATERIAL USED FOR ILLUSTRATION

SITUATION: Third-party content serving to expand upon or reinforce a point that an instructor has made by other means. Examples include digital "slides" in an art history course, botanical drawings in a science lecture, excerpts from recordings in a course on folk music styles, short film clips shown in a film studies class to illustrate a point or argument, and photographs or drawings used to depict events and personalities in a history course.

PRINCIPLE: Illustrative uses are essential for effectively portraying and explaining information to learners. Practices vary around the licensing of illustrative examples in learning materials (such as textbooks) created for sale. In nonprofit education settings, however, the instructor's right to use relevant examples under fair use has never been successfully challenged in a court of law. The drafters of this code believe that OCW makers should enjoy the same use rights as other educators. This principle applies to any copyrighted material, from historical letters to YouTube videos.

LIMITATIONS: Relevance is the key concept distinguishing fair uses from questionable ones in this category. OCW providers should look for the relationship between incorporated illustrative material and course objectives.

- The incorporated material should clearly advance an instructor's teaching goals.

- Copyrighted material that serves primarily to add entertainment value to the course should be avoided, as should merely duplicative illustrations that do not add materially to students' understanding.
- The extent of the use should be no more than is reasonably needed for the illustrative purpose.
- Where possible with reasonable effort, the source of the illustration should be attributed.

COPYRIGHTED MATERIAL USED FOR DEMONSTRATION OR EXPLANATION

SITUATION: The copyrighted material does not simply reinforce, dramatize, decorate, or illustrate a point or argument, but actually furthers understanding by demonstrating or illustrating a process, procedure, or arrangement. Examples include the use of a chart that summarizes experimental or observational findings, an animation that demonstrates the operation of a machine or body part, and a passage of text that sums up a complex historical development or cultural phenomenon. In some cases, materials quoted in this use category are created specifically for educational purposes (graphics from textbooks, for example), and in others they are items created for other purposes and repurposed by the instructor.

PRINCIPLE: Uses for demonstration and explanation can be fair when the instructor is not merely trying to save effort in constructing a lesson. The strongest argument for fair use arises when the copyrighted content was prepared by the copyright owner for purposes other than education and is not being actively licensed in the educational market.

LIMITATIONS: In incorporating demonstrations and explanations from copyrighted sources, OCW providers must walk a line between allowing legitimate transformative use and avoiding unfair and exploitive use.

- The demonstration or example should be integral to the lesson.
- It should not be merely cumulative with other lesson materials serving the same function.
- No ready substitute (including one that the instructor himself or herself could create with reasonable effort) should be available.

- The extent of the use should be appropriate to the purpose.
- Where reasonably possible, the source of the demonstrative or illustrative material should be fully attributed.

ASSIGNED AND SUPPLEMENTARY MATERIALS

SITUATION: A course draws systematically upon copyrighted materials to help explain the concepts or lesson it imparts, or assigns such materials for independent review. A provider of OCW may wish to make available electronic versions of these materials (e.g., some segments of OCW users are located in areas without continuous Internet connectivity.)

PRINCIPLE: Although fair use applies to some aspects of "e-reserves" and course management systems in conventional educational settings, these do not translate readily to the OCW context. As a general matter, it is preferable to provide links or citations to materials of this kind, rather than to include them (whether in their entirety or in substantial part).

LIMITATIONS: Fair use should be employed cautiously where this category of uses is concerned. It will be particularly inappropriate when the material in question originally was prepared for educational or scholarly purposes, or is being actively licensed for use in educational settings. In such cases, it is difficult to conclude that OCW use is meaningfully transformative or socially beneficial.

- Where the material in question is not routinely licensed or available for sale for the intended amount of use, it may be more reasonable to rely on fair use.
- The same is true where the copyright ownership of the material cannot be ascertained by a reasonable effort employing the best search tools available.
- In situations of this kind where fair use is relied upon, OCW providers should be prepared to remove the material in question or license it when and if the copyright owner comes forward.
- Where reliance on fair use is crucial, providers should limit the amount of reading material made available in connection with OCW courses to only those passages that are most directly germane to a specific lesson.
- Attribution of the material should be provided.

Conclusion

This document will be used by OCW makers in the United States to achieve the highest goals of their educational mission. It will also be useful to makers outside the United States, who may be able to match up their own country's educational exemptions with the standards described here. Again, this document is not intended to set outer limits for fair use in OCW, nor is it intended to be a comprehensive blueprint for every OCW project. The categories identified are simply those that surfaced most commonly in our interviews, and other practices of OCW creators also may qualify—now or in the future. Finally, OER creators can usefully extrapolate from this beyond the confines of OpenCourseWare.

[1] § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

PROJECT DIRECTOR

Lindsey Weeramuni, intellectual property supervisor, MIT OpenCourseWare

Weeramuni is the intellectual property supervisor of MIT OpenCourseWare, a free and open publication of MIT course materials that reflects almost all the undergraduate and graduate subjects taught at MIT, all available with no registration required (http://ocw.mit.edu/). Weeramuni developed the IP strategy for MIT OpenCourseWare and oversees its implementation in the ongoing publication. She also consults with members of the OpenCourseWare Consortium, a worldwide collaboration of more than 200 higher education institutions and associated organizations creating open educational content using a shared model.

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Jaszi is one of the founders of the WCL's Program on Information Justice and Intellectual Property (PIJIP), which promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. Jaszi initiated the best practices in fair use model, developed since 2004 in conjunction with the Center for Social Media.

Patricia Aufderheide, professor and director, Center for Social Media, School of Communication, American University

Aufderheide founded and directs the center, which showcases and analyzes media for social justice, civil society, and democracy, and the public environment that nurtures them. The best practices in

fair use project, led by Aufderheide with Jaszi and PIJIP, has resulted in several other codes of best practices in fair use, which have changed norms of practice for creative and user communities.

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