

Teaching Copyright through Pop Culture for Public Scholarship-Based Instruction

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Public scholarship is academic research that reaches beyond the academy. It connects the public's desire to understand current events with scholarly expertise, full of risk and reward, bringing vital research work into the public consciousness. This raises the visibility of important issues for researchers' institutions and researchers themselves, which leads to a variety of positive and exciting outcomes; these include the transformation of how public audiences can engage with critical social issues, as well as researchers finding new collaborators or receiving funding and other awards. These outcomes are enhanced when working with students to develop projects to learn skills, share knowledge, and create new knowledge that may be used in a variety of contexts, including Open Educational Resources designed for future iterations of a course. Librarians can enhance the pedagogical benefits and minimize potential risks presented in the creation of public scholarship by emphasizing the importance of privacy, information literacy, and the appropriate management of intellectual property. Given this pedagogical value and impact on student success, finding effective instruction strategies for undergraduates was a key goal in the development of a comprehensive digital scholarship curriculum for the University of Oregon Libraries. We incorporated a variety of pop culture examples drawn from more recent years and relatable cultural touchstones. We chose this approach instead of reviewing many landmark cases that establish our current understanding of fair use because we wanted to offer course-relevant, nuanced, and

culturally-sensitive instructional materials that prepare students to be ethical consumers and creators of content.

When introducing copyright, we often begin with the stated goals of copyright: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” which means copyright should expire at some point and exceptions need to exist.¹ Otherwise, the public would see little good out of the exclusive reservation of rights. Given limited instruction time, the expiration of copyright is usually an area of limited coverage or is shifted to asynchronous material because it is more straightforward than other concepts of copyright that require critical consideration.

Post-2019 is an interesting time to discuss the public domain, however, as we finally have new work entering the public domain in the United States each year after the passage of the 1998 Copyright Term Extension Act (aka The Sonny Bono Act or The Mickey Mouse Protection Act), which delayed the expiration of copyrights from 1924 for 21 years. At the time of writing, the earliest Mickey Mouse cartoons are set to enter the public domain in 2024, though Disney’s trademarks on the character will not expire. With the expansive length of the copyright term (120 years from creation or 95 years from the death of the creator, whichever is shorter), very few examples retain the cultural cachet of Mickey Mouse. Of further interest, perhaps, is the list of “what might have been” in the public domain had the copyright term not been extended—*A Wrinkle in Time*, *Mary Poppins*, *The Giving Tree*, and *Goldfinger* would be in the public domain at the time of writing without the 1998 Copyright Term Extension Act.²

¹ U.S. Const. art. I, §8, cl. 8.

² Jennifer Jenkins, “Public Domain Day 2021 Pre-1976,” Center for the Study of Public Domain, Duke Law School Center for the Study of Public Domain, accessed January 9, 2021, <https://web.law.duke.edu/cspd/publicdomainday/2021/pre-1976/>.

Another interesting case of the public domain in pop culture relates to the 2020 Netflix film *Enola Holmes* based on the eponymous series by Nancy Springer written in 2006–2010. The estate of Arthur Conan Doyle sued Netflix, production companies Legendary Pictures and DMCA Productions, Nancy Springer, and her publisher Penguin Random House for copyright and trademark infringement. While most Sherlock Holmes stories are in the public domain, ten remain under copyright protection and, within these stories, Conan Doyle’s estate argued that Sherlock Holmes evolved into a more emotional, caring, and respectful character as a result of his creator’s experience in World War I.

This is the second such case filed by the estate since the majority of Conan Doyle’s work was declared in the public domain in the United States. The first, regarding the 2015 film *Mr. Holmes* starring Ian McKellen as the famed detective in his twilight years, was settled out of court and acknowledgment of the Estate appeared in the film and future editions of the book on which it is based. After a scorcher of a motion to dismiss from the lawyers of *Enola Holmes* producers, they, too, settled out of court. This is something of a pattern with copyright cases—settled, dropped, or never making it to court in the first place. Very few people, businesses, or institutions have the will, much less the budget, for a protracted court battle, so we have relatively few cases to guide our practice and few opportunities to defend intellectual property for the public good. Even when public institutions are willing and able to engage with corporate interests to defend fair use rights, it may not provide actionable guidance or arrive so much later that, in the words of Brandon Butler, “the world has moved on in a lot of ways.”³ After twelve years and \$3 million in attorneys’ fees, Georgia State University may have technically prevailed in the

³ Andrew Albanese, “Publishers Escape Fee Award as GSU E-Reserves Case Finally Ends,” *Publishers Weekly*, PWxyz, LCC., last modified October 2, 2020, <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/84514-publishers-escape-fee-award-as-gsu-e-reserves-case-finally-ends.html>.

suit that was brought against them, but guidance on how libraries might support instruction through digitization of print materials was not forthcoming.⁴

The world *has* moved on in many ways, particularly technologically, and neither copyright law nor its exceptions for the public good have kept up to date. Concepts of ownership have shifted, sometimes without our knowledge, leading to Digital Rights Management attached to a variety of content like video games, eBooks, music, and increasingly complex electronics like cars and cell phones, which can no longer be serviced or repaired by their owners. Given knowledge of likely infringements, the lack of previous instruction and common student and faculty questions, it is valuable to frame lessons and responses in the true spirit of sharing information. Through copyright instruction, we help our students operate in a frequently confusing area and enable them to ethically engage with creative spaces online as creators and consumers of content.

If public domain is a relatively straightforward expiration of the copyright term, then fair use is a *squishy* set of rights that the public has to use a work while it is still in copyright. These rights have been explained and upheld in a variety of court cases that give us a sense of what each factor means in practice. The 1997 Conference on Fair Use (CONFU) was held to support nonprofit educational use of copyrighted material and included stakeholders from across the creative industries, education, technological disciplines, law, and government. CONFU intended to establish firm boundaries and amounts of what does and does not qualify as fair use, often referred to as “bright lines.” These bright lines, which are not to be crossed, are much more attractive than the complex risk analysis required to determine fair use. CONFU was meant to cover text, video, music, and

⁴ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 112 U.S.P.Q.2d (BNA) 1697 (11th Cir. 2014).

multimedia works. The ten-percent rule that many people will cite when asked about rules regarding the use of copyrighted works likely comes from CONFU guidance for Educational Multimedia, which was the only output from the Conference that particularly caught on.⁵ These numbers, however, do not have the effect of law, do not weigh towards fair use when performing analysis, and place unnecessary restrictions on the fair use right that prevents a work's use to the fullest extent of the law. Furthermore, given that it was held in 1997, the conference did not address many of the digital uses current creators would like guidance on and such guidelines would always have difficulty staying up to date with the latest in creative and scholarly uses for copyrighted content.

The four-factor fair use analysis, from Section 107 of the copyright code, is intended to provide a mechanism by which anyone can evaluate their use of any copyrighted work and determine if it is fair or infringing.⁶ Clearly, this is a matter of opinion, but there are a variety of court cases and common illustrative examples that can be used to demonstrate how each factor works and, at times, layer together to provide a cohesive argument for fair use. The first factor is the purpose or character of use, sometimes known as transformative use or the transformative factor. This factor looks at how the prospective use differs from the intended purpose. Is it for scholarly or creative analysis and critique? Has the initial work been changed significantly in purpose or appearance? And finally, is this use for commercial purposes? Non-profit? Educational? Many students assume that because a use is non-profit or educational, it is automatically fair. In many cases, it may be, but in public scholarship, there is an extra level of scrutiny and visibility that can lead to takedown requests or requests for payment for the use of copyrighted material.

⁵ Georgia Harper, "CONFU – Background," Copyright Crash Course, University of Texas at Austin Libraries, last modified July 16, 2016, <https://guides.lib.utexas.edu/copyright/forms>.

⁶ Limitations on Exclusive Rights: Fair use, 17 U.S.C. § 107 (1976).

Google has won several cases related to fair use in regards to their Google Books project and Google Images.⁷ The Google Books project engaged in mass digitization in partnership with libraries offering digital preservation and a new context for physical works. They made millions of books available with optical character recognition, permitting full-text search and enabling access for people who are print-disabled. While the commercial purpose weighed against the finding of fair use, the court found that the digitized books were transformative uses of copyrighted content and not substitutes for the originals. Google Images helps users discover photos and other images on the web by indexing low-resolution thumbnails of images that may be behind paywalls or logins. A lawsuit brought by a website requiring subscriptions upheld a previous fair use case that thumbnails are not valid substitutes for originals and do not harm the potential market for subscription, sale, licensing, or marketing of images.

In 2014, re-photographer Richard Prince debuted a series of Instagram selfies, mostly of young women, which he had commented on, blown up, and mounted on canvas without the permission or knowledge of the subjects, and sold for upwards of \$90,000. While he rose to fame re-photographing cowboys from Marlboro cigarette ads, cropping out ad copy and re-framing the nostalgia-soaked images as fine art, in recent years Prince has been accused of a different kind of appropriation. In 2008, Prince debuted a series of re-photographed work originally by Patrick Cariou in a book about the Rastafarian community in Jamaica. Cariou brought suit in 2009 and the court found Prince's work to be infringing. This was overturned by a higher court in 2013 who found the works transformative and Prince and Cariou settled out of court.⁸ At the time of writing, multiple legal actions against

⁷ The Authors Guild v. Hathitrust, 755 F.3d 87 (2d Cir. 2014).; Authors Guild v. Google, Inc., No. 13-4829 (2d Cir. 2015).; Perfect 10, Inc. v. Amazon.com, Inc. and A9.com Inc. and Google Inc., 508 F.3d 1146 (9th Cir. 2007).

⁸ Patrick Cariou v. Richard Prince, 714 F.3d 694 (2d Cir. 2013).

Prince for infringement in his *Portraits* series are ongoing and have generated a great deal of discussion about ownership on social media.

The second factor to consider is the nature of the copyrighted work. Is it a creative work or nonfiction? Fair use favors the latter. The work's previous publication may also weigh in favor of fair use. This aspect was at the heart of a case involving J.D. Salinger, his unpublished letters at a variety of archives, and an unauthorized biography quoting and paraphrasing significant portions of these letters (see factor 3). The court found the biography's use of these letters to be infringing, taking the heart of the work, and affecting the market should Salinger ever wish to publish the letters himself.⁹ A similar case found that Jonathan Kwitny's use of half of Kennett Love's unpublished manuscript in the book *Endless Enemies*, which was used to prove Love's involvement in the 1953 Iranian coup d'état, was also considered not fair use.¹⁰ In these cases, there was some conflict between the right to privacy on the part of the authors of the unpublished material and the right to fair use on the part of the defendants; Congress amended the Copyright Act in 1992 to affirm the possibility of finding fair use for the use of unpublished works.¹¹ Publication status is simply one factor among the rest to consider in a fair use evaluation. The absence of previous publication can make it difficult to identify a date of creation for making a public domain determination, as well as identifying the author's name for appropriate attribution and permission-seeking. These largely

⁹ Colleen M. Salinger and Matthew R. Salinger, as Trustees of the J.D. Salinger Literary Trust v. Fredrik Colting, writing under the name John David California, Windupbird Publishing Ltd., Nicotext A.B., and ABP, Inc., doing business as SCB Distributors, Inc., 607 F.3d 68 (2d Cir. 2010).

¹⁰ Kennett Love v. Jonathan Kwitny, Congdon & Weed, Inc., St. Martin's Press, Inc., Book-of-the-Month Club, Inc., Barnes & Noble Bookstores, Inc., B. Dalton Company, Coliseum Books, Inc., Doubleday Doran Book Shops, Inc., and John Kelly, 706 F.Supp. 1123 (SD New York 1989).

¹¹ An act to amend title 17, United States Code, relating to fair use of copyrighted works, 17 U.S.C. § 107 Pub. L. No. 102-492, 106 Stat. 3145 (1992).

unidentifiable materials are known as orphan works and without further guidance from the legislature or judiciary, they are doomed artifacts of our copyright system.

The third factor is the amount used compared to the rest of the work (this is like CONFU's ten-percent rule that people find easier to abide by) and whether that amount is the "heart" of the work. This idea of the "heart" is very subjective, but in the case of the Salinger biography, the "heart" was considered the letters because people would no longer be interested in them after reading the biography. Similarly, the publication of just 300 words of President Gerald Ford's memoirs in *The Nation* was found to be infringing because the newsmagazine infringed on Ford's right to serialize his work if he wanted to—and those 300 words were the passage describing his pardon of disgraced former-President Richard Nixon for whom he had served as Vice President for eight months.¹² This idea of the "heart of the work" could be seen as related to factor four: if what is used is enough that the original is no longer needed, this will likely affect the market for that work, which also weighs against fair use.¹³ Amount used can also play into the resolution of images; it must be small, in a low resolution, and well-contextualized or used in a transformative manner, such as the Google Images case and its low-resolution thumbnails.

At the time of writing, the use of copyrighted material in YouTube, Twitch, and other video-uploading sites has been a cause for significant frustration and confusion. Major media companies employ an enormous variety of algorithmically-powered bots to crawl these sites and issue Digital Millennium Copyright Act notices, which, per the 2008 case *Lenz vs. Universal Music*

¹² Linda Greenhouse, "High Court Sustains Ford Memoir Copyright," *New York Times*, May 21, 1985.

¹³ Kenneth D. Crews, "Fair Use," Copyright Advisory Services, Columbia University Libraries, accessed January 9, 2021, <https://copyright.columbia.edu/basics/fair-use.html#factor3>.

company,¹⁴ should take the possibility of fair use into account, but this is a task bots are unable to do. It is possible to claim fair use on YouTube when their Content ID system identifies copyrighted material in your video, but even if it succeeds, monetization will likely not be reinstated. YouTube has an equivalent of “traffic school” for the first copyright infraction and then functions on a three-strikes system: three copyright errors on a user’s part results in their videos being deleted, their channel shut down, and they are forbidden from creating a new channel.¹⁵ To avoid this, YouTube encourages the use of their royalty-free Audio Library.

Twitch received a large number of DMCA takedown notices in spring 2020 that neither it nor its user base were prepared to deal with.¹⁶ Most of the infringement took place as streaming music in the background of recorded streams as part of users’ Videos on Demand (VOD) channel. Users had little time to respond to these requests and few tools to remove the offending audio stream or even identify which video had infringing music at all. It took months to implement, but Twitch created tools to facilitate the process of identifying and deleting VODs with copyrighted music and introduced Soundtrack, a library of free licensed music for live streaming that notably is not included in VOD or clips.¹⁷ While TikTok has its share of copyright issues, Byte Dance (the company that owns TikTok) has invested in licensing deals with many major

¹⁴ Stephanie Lenz v. Universal Music Corp; Universal Music Publishing, Inc.; Universal Music Publishing Group, Inc., 815 F.3d 1145 (9th Cir. 2015).

¹⁵ “Copyright Strike Basics,” YouTube, accessed January 9, 2021, https://support.google.com/youtube/answer/2814000?hl=en&p=c_strike_basics#zippy=%2Cwhat-happens-when-you-get-a-copyright-strike.

¹⁶ Bijan Stephen, “Twitch Streamers are Getting Blindsided by Years-Old Copyright Notices,” *The Verge*, last modified June 8, 2020, <https://www.theverge.com/21284287/twitch-dmca-copyright-takedowns-clips-controversy-broken-system>.

¹⁷ “Soundtrack (Beta) Help Page & FAQ,” Twitch, accessed January 9, 2021, <https://help.twitch.tv/s/article/soundtrack>.

record labels and distributors.¹⁸ This has prevented the kind of large-scale takedown notices endemic on many platforms.¹⁹ As we will discuss in the section on Creative Commons, licenses layer on top of copyright and change the way one interacts with a given work.

The fourth and final factor is the effect on the market or value of the copyrighted work. In the most public days of Napster, Pirate Bay, and other file-sharing sites, a fair use defense was presented on behalf of the unlucky folks who were singled out for infringement.²⁰ This defense was unsuccessful because a sample of the music could be previewed on iTunes to make a purchasing decision but once a consumer has the full album for free, they are thought unlikely to pay for another copy, and no transformative use was involved in the copying of music files. This is also one of the reasons sharing textbooks will almost never be fair use, particularly in the classroom setting. Textbooks and workbooks were designed to be purchased by the individual students and by using or sharing chapters or problem sets, there is no transformative use or re-contextualization. By not requiring its purchase for use in class (what it was designed for), there is an impact on the market, even if it is small and localized.

¹⁸ Katherine Rodgers, "TikTok is Changing the Rules of the Music Industry," TechRadar, last modified July 15, 2021, <https://www.techradar.com/news/tiktok-is-changing-the-rules-of-the-music-industry>.

¹⁹ Bijan Stephen, "Twitch Streamers are Getting DMCA Takedown Notices (again)," *The Verge*, last modified October 20, 2020, <https://www.theverge.com/2020/10/20/21525481/twitch-streamers-dmca-takedown-notices-riaa-copyright>.

Mia Sato, "YouTube Reveals Millions of Incorrect Copyright Claims in Six Months," *The Verge*, last modified December 6, 2021, <https://www.theverge.com/2021/12/6/22820318/youtube-copyright-claims-transparency-report>.

Jere Odell, "Did ResearchGate Take Your Article Down?" Center for Digital Scholarship, IUPUI University Library, last modified September 24, 2021, <https://cds.ulib.iupui.edu/blog/did-researchgate-take-your-article-down>.

²⁰ *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319 (D. Mass. 2009).

There have been several fair use cases related to unauthorized fan works impacting the market of their subjects: Seinfeld's trivia book,²¹ *Twin Peaks'* guide to the show,²² and the *Harry Potter Lexicon*²³ were all shut down for their impact on the market for authorized works. Fan work can be published commercially, as demonstrated by *The Wind Done Gone*, *Wide Sargasso Sea*, and *Oh Beauty*. Houghton Mifflin, publishers of *The Wind Done Gone*, were sued by the estate of Margaret Mitchell, but the Eleventh Circuit determined the use of characters from *Gone with the Wind* as parody and thus, fair use, and Margaret Mitchell's estate dropped the suit after Houghton Mifflin made a donation to Morehouse College, a historically black men's college in Atlanta.²⁴ The commercialization of fan fiction also received heightened media attention with the success of E. L. James' *Fifty Shades* series, which started life as a series of *Twilight* fan fiction, and gave rise to a veritable cottage industry with many titles published by Simon and Schuster's Gallery imprint. While many armchair lawyers (and the *Washington Post*)²⁵ speculated about a *Twilight/Fifty Shades* copyright rumble, fair use seems to have won the day.

Because of the fair use cases we have discussed, many people are often uncomfortable making a fair use judgment call because they are afraid of either being right or wrong, infringing

²¹ Castle Rock Entertain. v. Carol Publish. Group, 150 F.3d 132 (2d Cir. 1998).

²² Twin Peaks Productions v. Publications Intern, 996 F.2d 1366 (2d Cir. 1993).

²³ Warner Bros. Entertainment Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

²⁴ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); David D. Kirkpatrick, "Mitchell Estate Settles 'Gone With the Wind' Suit," *New York Times*, last modified May 10, 2002, <https://www.nytimes.com/2002/05/10/business/mitchell-estate-settles-gone-with-the-wind-suit.html>.

²⁵ Christina Mulligan, "The Most Scandalous Part of 'Fifty Shades of Grey' Isn't the Sex and Bondage." *Washington Post*, last modified February 11, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/02/11/the-most-scandalous-part-of-fifty-shades-of-grey-isnt-the-sex-and-bondage/>.

on someone's copyright or getting sued. When teaching copyright in the classroom, fair use appears front and center. Nervousness and unease can permeate because when it comes to performing a fair use analysis, the judgment call is usually placed on the individual. Students who create public scholarship that reuse creative works need to conduct fair use analyses for works still in copyright. Regardless of being a high school, undergraduate, or graduate student, many students are not familiar with the four factors of fair use or have not had a strong foundational introduction to United States copyright law.

Authentic learning is key to teaching about copyright and fair use. Learning is an active process that should give students space to explore problem solving and inquiry through their own experiences and knowledge grounded in a reality that is not abstracted by theory and "legalese." At the University of Oregon (UO), students taking classes that require producing public scholarship, either in the form of blogging or making an individual or group project, are introduced to copyright and fair use when a librarian is embedded or invited for a one-shot instruction session. There are two approaches to teaching copyright and fair use that UO digital scholarship librarians take when applying authentic learning to one-shot live instruction sessions or flipped classroom instruction sessions. With these instruction approaches, librarians hope students are able to demonstrate a depth of knowledge and to find connectedness beyond the classroom as well as with communities outside of academia.

The first is the one-shot library instruction session that introduces reusing creative works for publicly accessible digital humanities projects. The other is a flipped-classroom approach where librarians work with the lead faculty instructor to integrate copyright and fair use education into the curriculum and assignments. Introduction videos about the foundations of copyright and fair use are reviewed by students, and then students complete a quiz connected to assignment relevancy. Once students have completed the asynchronous portion of the

lesson plan, then they work with librarians in the classroom to apply the knowledge they gained and discuss copyright and fair use as applied to their public scholarship.

Each of these approaches centers students' authentic learning by asking them to bring forward questions and ideas relevant to their assignments. It also gives librarians an opportunity to assess the students' understanding of copyright and fair use; for example, students in a graduate-level digital humanities seminar and an upper-level undergraduate digital mapping course have the goal of producing public scholarship projects that reuse digital primary sources. For these courses, librarians designed a ninety-minute one-shot instruction session where students were asked to review a research guide that provided foundational knowledge about intellectual property rights, information about fair use, giving attribution, and why Creative Commons is important for the remix and reuse of creative works. Students submitted questions ahead of time using a collaborative online shared document open to the whole class. This prompt connected questions relevant to their interests about copyright and fair use to their digital project. The document displayed all the questions submitted so the whole class could see if someone else had a similar question as them. The document also allowed the librarians to identify topic trends for which they could dive deeper in class as opposed to focusing on topics that were not of interest to the students. Librarians took this approach to instruction because they wanted to make a critical thinking experience relevant to students' interests. Once students joined the live session of the course, the librarians lectured and had students engage in two short ten-to-fifteen-minute activities to clarify confusion around copyright and fair use definitions, components of fair use, and where to find public domain or Creative Commons licensed works. Within these activities, the questions students asked were incorporated into library instruction. In case the librarians could not get to all the answers in class, they made sure to respond fully in the collaborative document after class.

Popular culture references always come up in class discussions when students begin to critically think about reusing creative works. As part of the discussion, popular culture and copyright can come up within the context of YouTube fan criticism videos, like those produced by feminist YouTuber Lindsay Ellis,²⁶ which reuse popular movie and television show clips. For students not familiar with this YouTube genre or popular culture reference asked about, we review a short video or media product, and then together the class begins working through each fair use factor using a pros and cons framing to craft an argument and justification. This collaborative learning and teacher-as-facilitator model, engage the students to pose critical questions connected to individual or combinations of fair use factors, and allows them to thoughtfully give weight to each one. Questions and comments such as:

- “How much time from the movie does the creator use?”
- “The creator’s intentions are to provide commentary and critique.”
- “Couldn’t a production company like Disney make more money because of this YouTuber making their movies more visible and help gain interest generated from this video?”
- “Aren’t these videos now part of movie culture? Isn’t the purpose to engage audiences in critique?”

By asking these questions, students make connections to understand fair use. The activity also shows inquisitiveness and interest in problem solving.

In preparing students to engage in digital scholarship work, even content consumption is done with an eye toward reuse, remixing, and creation. With Creative Commons licensing, we are able to introduce the idea of using work according to specified terms and

²⁶ Lindsay Ellis, “Lindsay Ellis,” YouTube Channel, YouTube, last modified October 21, 2021, <https://www.youtube.com/channel/UCG1h-Wqjtwz7uUANw6gazRw>.

conditions—and once that has had an opportunity to percolate, what it might mean to license their own work under similar terms. After the careful thought required for fair use evaluations, the comfort of clearly labeled materials with instructions on how to use them can be very exciting. The Creative Commons image search is getting better all the time and between that, Google's Advanced Image Search, Noun Project, Unsplash, and Wikimedia Commons, the options for creative illustration are very exciting. As librarians, we are able to suggest unique digital collections and digitized special collections relevant to the students' research interests, and have productive discussions about rights metadata. When we were unable to find alignment, secure permission, or were restricted from external embedding, we included a text link or a linked icon to indicate the media resources. Creative Commons licenses have been used by a variety of successful sites, individuals, and organizations, enabling them to vastly increase their reach through linked data (e.g., Wikipedia), permitting others to republish their stories to find new audiences (e.g., *ProPublica*), encouraging sharing and remixing (e.g., *Cards Against Humanity*, *xkcd*), and generally making enormous swathes of content available (e.g., Flickr).

Still using authentic learning as a teaching strategy, the second type of library instruction used to teach copyright and fair use is the flipped-classroom model. For a lower-level undergraduate class assigned with creating essays using publicly-available digital visual resources, librarians developed copyright and fair use online learning modules. In these modules, students were asked to review instruction videos introducing copyright and fair use, and then to identify the four factors of fair use. Students were introduced to Creative Commons and where to find visual resources with Creative Commons licenses online. These sites included Unsplash, the Digital Public Library of America, and Google Images. After reading and viewing the course content, students were asked to complete a short quiz about the concepts learned and bring a visual resource to class for discussion. This

model offers librarians a mechanism to assess student learning before joining class and builds in-class time for activities. Students have incentive to prepare because they were told by their primary instructor they would be working in groups and sharing knowledge with their peers.

For the live session, students arrive with an understanding of copyright and fair use's foundational concepts. To warm the students up, they are asked to complete a poll with the following questions: "Why are you learning about copyright?" and "Why is copyright important for your class project?" Results are shared among the class, which allows librarians to clarify and answer questions students had about their project. Students were sorted into small groups for a ten-minute activity where they would share one visual resource and begin answering the questions: "Where did you find the visual resource?," "Who owns the copyright?," "How do you know who owns the copyright?" While students answered these questions, the librarians visited each group to offer support. After students answered these questions, they were asked to share their responses with the class. Students were then put back into their groups to answer the question: "Is the visual resource licensed with a Creative Commons license? Explain your answer." Students were brought back together as a class and we discussed responses to the questions, and incorporated their class project.

Throughout this lesson, librarians used class discussion as a formative assessment to give the students opportunity to develop clear verbal communications about ideas and meaning, as well as build their listening skills. The first activity highlighted what students understood about copyright and asked them to identify relevance to their project. Librarians used frequent small group activities to promote a comfortable, student-centered environment. Each of these activities built upon each other. Taking this scaffolded approach brought forward concepts about ownership and how ownership of visual resources can be communicated online. The major outcomes for this activity

included students finding copyright owner information and communicating where they found this information. For the second activity, students finding copyright owner information brought forward the connections between copyright and Creative Commons licensing. The major outcomes from this activity included students determining if a visual resource has a Creative Commons license and explaining why or why not. Throughout the lesson, student engagement in class discussion opened opportunities for librarians to clarify how Creative Commons functions and the importance of attribution. At the close, students were pointed to a library resource about how to give attribution to original creators when using their content.

While Creative Commons licenses have helped creators make decisions about their work and how they wish to exercise control over it, both Creative Commons and the copyright system from which these licenses have emerged are still deeply rooted in an Anglo-European way of being, knowing, and creating. Indeed, the entire copyright system in the United States is structured around the tangible, fixed medium to which something is attached. This fixity excludes many cultural and artistic works and Indigenous knowledge created by people of the First Nations of the United States, such as the performance of music, dance, and ceremony; oral traditions and folklore; cuisine; and other intangible cultural heritage-based intellectual property.

While not a copyright case, *Navajo Nation v. Urban Outfitters* (2012-2016) demonstrates aptly a number of issues particularly relevant to Indigenous intellectual property.²⁷ When discussing this case in class, one of the first issues we address is that of language: Navajo is not a synonym for Native American. While the patterns, prints, and designs used by Urban Outfitters may not rise to the particular level of originality and fixity required to

²⁷ *Navajo Nation v. Urban Outfitters, Inc.*, CIV 12-0195 BB/LAM (D.N.M. Jul. 5, 2016).

demonstrate fixity under US code, they are nevertheless part of Navajo cultural heritage. By putting said patterns and designs on underwear and flasks in defiance of a culture that prizes modesty and sobriety, cultural appropriation has strayed into greedy misuse. Ultimately, this was a trademark case about the use of the Navajo name and the defense of that name as required under trademark law and the requirement of the *Indian [sic] Arts and Crafts Act of 1990* that goods purporting to be made by Native Americans are, in fact, made by Native Americans.²⁸ Like so many intellectual property cases, this was settled out of court, but it was announced that Urban Outfitters would work with Navajo craft people to design and release authentic Navajo goods.

Inspired by Creative Commons licenses, in 2010, Local Contexts was founded by Jane Andersen and Kim Christen.²⁹ The intention of Local Contexts is to legitimize the decision-making and Indigenous governance frameworks for determining access, ownership, and culturally appropriate conditions for sharing the collections of Indigenous cultural heritage and data. With emphasis on incorporating Indigenous values into data systems, Local Contexts gives strategies for cultural institutions, Indigenous communities, and researchers. It does this through Traditional Knowledge (TK) and Biocultural (BC) Labels and Notices. TK and BC Labels and Notices are a mechanism for Indigenous communities to add cultural and historical context and political authority to cultural heritage when housed and overseen by institutions and organizations with digital archives, libraries, and

²⁸ Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 STAT. 4662 (1990).

²⁹ "Grounding Indigenous Rights," Local Contexts, accessed August 25, 2021, <https://localcontexts.org/>.

Jennie Rose Halperin, "Is It Possible to Decolonize the Commons? An Interview with Jane Anderson of Local Contexts," Creative Commons (blog), last modified January 30, 2019, <https://creativecommons.org/2019/01/30/jane-anderson/>.

museums. Local Contexts also function as a path to push forward innovation and data sovereignty for Indigenous communities.

As of 2021, there are 18 TK labels for Indigenous communities to use for their cultural heritage and data, all of which are allowed to be customized by a community interested in using it within their own local context. These labels range from letting people know who the correct custodians, owners, and sources are to labeling materials restricted to those of specific genders. Overall, these labels have allowed communities to have a digital strategy to exercise control over their community's knowledge.

Communicating how Indigenous cultural heritage can be shared and reused was a focal point to scholar and Hopi Tribe community member, Dr. Trevor Reed, who presented a talk titled "Fair Use as Cultural Appropriation: Why the 'Forgotten Factor Matters'" for the American Library Association's CopyTalk Webinar Series.³⁰ His lecture gave an historical overview of federal Indian policy to set the stage for cultural and governance sovereignty and how settler United States copyright law needs to consider cultural appropriation as part of fair use analyses. Reed argues that the nature of a work (the second factor), such as what is being appropriated, needs to be deeply considered because Indigenous communities' cultural works are inherently sacred and spiritual. He proposed the nature of a work cannot be empirically measured or evaluated in a factual way; the network of meaning and value have connections. Reed believes that we should be looking at the second factor beyond privileging dominant European cultural categories and need to understand, look, and learn about the context in which cultural heritage is created within a community that produced it. The original intention and creative environment that creates a piece of

³⁰ David Free, "CopyTalk Webinar: Fair Use as Cultural Appropriation," ACRL Insider, American Library Association, last modified September 24, 2020, <https://acrl.ala.org/acrlinsider/copytalk-webinar-fair-use-as-cultural-appropriation/>.

cultural heritage should be analyzed and considered when it is used.

In contrast to cultural heritage materials, scholarly databases owned by multinational conglomerates have a perceived value and are granted a particular level of copyright and technical protection. In the digital humanities, we often talk about the scholarly communication infrastructure: which databases will permit data mining; which ones will not (and will lock you and the entire school out if you try); and, which will allow data mining for an additional cost. Whether students are first years or all-but-dissertation, they have experienced encountering a paywall and quite possibly the usefulness of SciHub or preprint servers that have freely-available PDFs.

It is never too early to start talking about open access to our next generation of citizens and scholars, who will likely experience an apocalyptic loss of access when they leave the university. The pandemic and the enclosure of the publicly-funded vaccines behind patents drew a great deal of attention in 2020 and 2021, as did the decision by major publishers to drop paywalls for research related to COVID-19 and Ebola. This led some to question if having that medical research open during this time of crises is for the public good, wouldn't it be good to have all medical research open all the time? Or perhaps all research open all the time?

Aaron Schwartz and his Open Access Manifesto³¹ considered such a future before his premature death in 2013 following aggressive federal prosecution for computer crimes associated with mass data downloading from JSTOR. His story is chronicled in the documentary *The Internet's Own Boy*, which can be found in the

³¹ Aaron Swartz, Guerilla Open Access Manifesto, July 2008, Internet Archive, <https://archive.org/details/GuerillaOpenAccessManifesto>.

Internet Archive.³² Scholars have protested the enclosure of research behind paywalls by publishing their work in open access journals, many of which use Creative Commons licenses like *PLoS*, and contribute to scholarly communication sites like *The Conversation*, which help share the results of scholarly research in a readable, useful way and license those articles under a Creative Commons license. In these ways, we can demonstrate how students are participating in a larger community of scholars who care about equitable access to information while improving the visibility of their portfolio.

Depending on the class, one or more of these assignments may be used. We have built asynchronous modules to explore each of these topics so class time may be dedicated to discussion, questions, and projects with functional experts present. Students are required to engage critically with how different people create, interact with, and share information, then make decisions about how to do so themselves, both in the classroom and in the world. Pop culture helps make these concepts more fun and relevant, but also gives them weight and a certain complexity that cannot be manufactured. Many copyright and fair use cases are based in pop culture, so it is just a matter of selecting the most interesting ones for discussion. Social media and related technologies are providing many opportunities to push the boundaries of intellectual property, as are fan interactions with their favorite creators, celebrities, and properties, so it behooves us all to stay tuned as the definitions and boundaries of "authorship," "ownership," and "content" blur and change. By providing students a strong foundation in copyright and how it functions within our laws and society, they become better able to

³² *The Internet's Own Boy: The Story of Aaron Swartz*, directed and written by Brian Knappenberger (Los Angeles, CA: Participant Media and FilmBuff, 2014), documentary film, accessed from Internet Archive, <https://archive.org/details/TheInternetsOwnBoyTheStoryOfAaronSwartz>.

understand these changing conventions as creators, consumers,
and digital citizens.

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