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How to Fight Fair Use Fear, Uncertainty, and Doubt: The Experience of One Open Educational Resource

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How to Fight Fair Use Fear, Uncertainty, and Doubt: The Experience of One Open Educational Resource

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Abstract

At the launch of one of the early online open educational resources (OER) in 2002, the approach to addressing copyright was uncertain. Did the university or the faculty own their material? How would the third-party material be handled? Was all of its use considered fair use under Section 107 of the U.S. Copyright Act (Title 17, United States Code) because of its educational purpose? Or was permission-seeking necessary for this project to succeed and protect the integrity of faculty and university? For many years, this OER was conservative in its approach to third-party material, avoiding making fair use claims on the theory that it was too risky and difficult to prove in the face of an infringement claim. Additionally, being one of the early projects of its kind, there was fear of becoming a target for ambitious copyright holders wanting to make headlines (and perhaps win lawsuits). It was not until 2009 that the *Code of Best Practices in Fair Use for OpenCourseWare* was written by a community of practitioners who believed that if fair use worked for documentary film makers, video creators, and others (including big media), it worked in open education as well. Once this Code was adopted, universities and institutions were able to offer more rich and complete course content to their users than before. This paper explains how it happened at this early open educational resource offering.

Keywords: fair use, open educational resources, training,
Codes of Best Practices, Creative Commons

How to Fight Fair Use Fear, Uncertainty, and Doubt: The Experience of One Open Educational Resource

In October 2003, the Massachusetts Institute of Technology (MIT) officially launched an ambitious project to offer what it was calling an “open educational resource” (OER). This was after a grand pronouncement in a 2001 article by Carey Goldberg in the *New York Times*: “Auditing Classes at MIT, on the Web and Free” (Goldberg, 2001). In that announcement, then university President Charles Vest said that it would offer virtually all of its courses online, including materials like lecture notes, problem sets, syllabi, exams, and video lectures. Professors’ participation would be voluntary, but users would not earn college credits.

Many, many questions ensued. Why would it succeed where others had failed in the Web educational technology landscape (Arnone, 2001; Carlson & Carnevale, 2001)? Why was MIT giving the content away for free? What if no faculty wanted to participate? What about intellectual property? As Goldberg (2001) wrote, “there is the question of intellectual property, already a thorny one in academia as the promise of Internet riches exacerbates the question of who owns the electronic rights to a professor’s lectures and research.”

The Creative Commons was still in its infancy in 2003 and did not yet exist in its present form. As the university’s faculty advisory committee and senior administrators considered the way in which they wanted the OER to be used, it was decided that the principle of allowing users to take advantage of what is now known as the “Five R’s” identified by Wiley (n.d.), “retain, reuse, revise, remix, and redistribute,” was the common goal. From the beginning, addressing copyright was of paramount importance, but still widely misunderstood. The faculty advisory committee charged with representing their colleagues, attorneys from the Office of General Counsel, and a newly hired Director of OpenCourseWare assembled to consider the licensing options. All agreed that that they should request permission to publish a professor’s work via a non-exclusive license to allow her to reserve her copyright for other uses, so one was promptly written (see Appendix A). However, how should the rest of the material be handled? What about content not owned by the faculty, such as textbook images or unsourced web photos? Music or film clips? No policies existed, and opinions ranged from “all educational use is fair use” to “fair use is an invitation to be sued.”

Against this backdrop, the staff charged with delivering this content took a conservative position and avoided making any fair use assessments for third-party material. If permission could not be obtained, the material would either be recreated graphically, or be removed and replaced with a citation and a link to its home on the Web (if possible). For examples, see Figures 1–3.

Carbon Emissions Projections

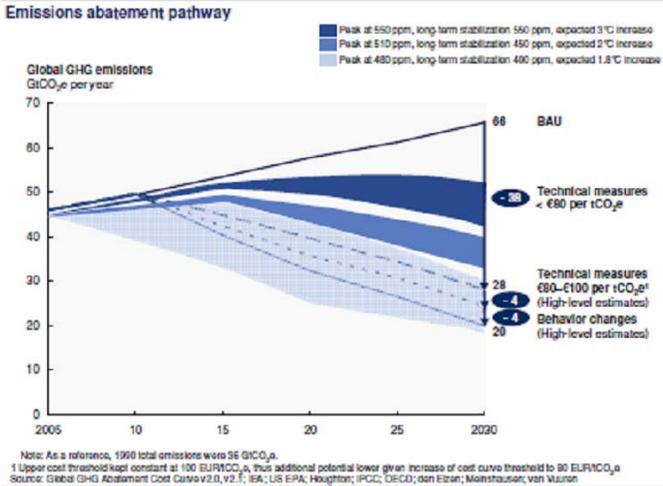


Figure 1: Original image from sources where copyright is held by a combination of government agencies and publishing companies

Carbon Emissions Projections

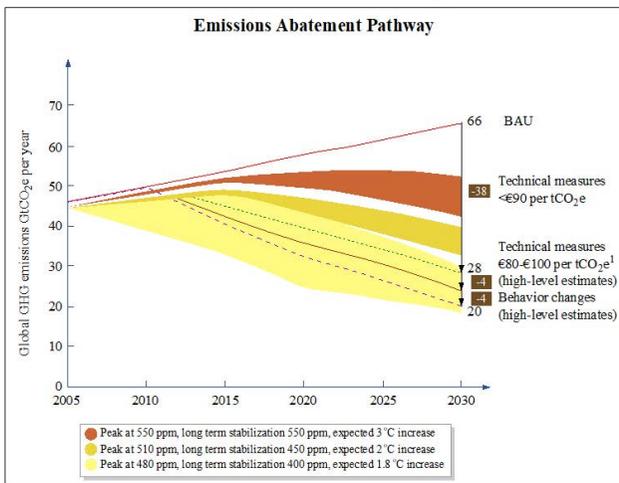


Image by MIT OpenCourseWare.

Figure 2: New creative version of Figure 1, as rendered by OCW’s graphic artists



Chemical Molecules

nucleic acids, proteins, carbohydrates, lipids

Images removed due to copyright restrictions.

"Anchoring of integral proteins to the plasma membrane..."
 Figure 3-36 in Lodish, H., et al. *Molecular Cell Biology*. 4th edition.
 New York, NY: W. H. Freeman, 2000.
 Viewable at the NCBI Bookshelf
<http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=mcb.figgrp.618>

Diagram of phospholipid bilayer,
 containing retinal pigment.

Molecule structure image,
 highlighting small domain and
 large domain.

Figure 3: Slide with citations of images removed due to copyright restrictions with URLs where available

Where permission cannot be obtained and commissioning a new image is not appropriate, a citation of the removed object appears, ideally with a link to its home in the Internet. Descriptive text is left in its place. In Figure 3, the images were from a book published by W.H. Freeman. This publisher will not grant permission to us under the terms of our Creative Commons license, thereby requiring us to remove the images.

The MIT OpenCourseWare (OCW) staff is comprised of a publication team who recruit courses and work directly with faculty to move the course along from its original course files to the OCW format. The production team oversees the overall look and feel of the website and is responsible for the quality assurance process to make sure the content is free of errors and is accessible to all users. Lastly, the copyright team is responsible for seeing that all content is properly licensed under the Creative Commons BY-NC-SA license (Creative Commons, n.d.). It took the OCW staff a full seven years to understand and eventually take advantage of fair use for its publication. It was the release of the *Documentary Filmmakers' Statement of Best Practices in Fair Use* (Association of Independent Video and Filmmakers [AIVF], Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, & Women in Film & Video [Washington, D.C. chapter], 2005) that helped the following

idea by the author of this paper take shape. Could MIT OCW produce a document that stated shared values and core beliefs about fair use amongst a community of practitioners as a viable solution for filling in much of the missing content? The university's OCW senior management did not want to be the "first in the water" in this unknown space. The *Documentary Filmmakers' Statement of Best Practices in Fair Use* says that, "Fair use is shaped, in part, by the practice of the professional communities that employ it" (AIVF et.al., 2005). If the institution could enlist the collaboration of other OCW producers in the U.S., this professional community as a whole could have a best practices statement of its own.

At the annual Open Education Conference of 2008, members of several university OpenCourseWare producers were discussing the success of the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. Once that document had been adopted, signatories were much more likely to have their films insured than before. Why was it not possible for purveyors of OER in the U.S. to have a similar kind of document?

A quick breakout discussion was held by a group of U.S. attendees, who pledged their time and human resources to the project. A team was formed, led by the author of this paper.¹ A grant was awarded by the Hewlett Foundation. Project Director Weeramuni reached out to Patricia Aufderheide of the American University in Washington D.C. and Peter Jaszi of the Washington School of Law with a request to facilitate the creation of a code of OCW. Aufderheide set up a workspace in Basecamp for people to upload campus interviews about attitudes regarding fair use and their research findings. Jaszi met with available team members to discuss the significance of the Code model and the benefits to their work as a community of practitioners. By the end of 2009, the *Code of Best Practices in Fair Use for OpenCourseWare* (hereafter, *OpenCourseWare Code*) published by the Center for Media and Social Impact (2009) was ready to be presented and put into use (Figure 4).

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1. This group included Terri Bays, formerly director of Notre Dame OpenCourseWare; Daniel Carchidi, publication director, MIT OpenCourseWare; Sheree Carter-Galvan, associate general counsel, Office of General Counsel, Yale University; Pamela Chambers, attorney, Office of General Counsel, Yale University; Garin Fons, open education specialist, University of Michigan Open.Michigan; Ira Gooding, project coordinator, Johns Hopkins Bloomberg School of Public Health OpenCourseWare; Joseph Hardin, clinical assistant professor of information, School of Information, University of Michigan; Pieter Kleymeer, open education specialist, University of Michigan Open.Michigan; and Robbin Smith, OCW editor/curricular content specialist, Tufts OpenCourseWare.

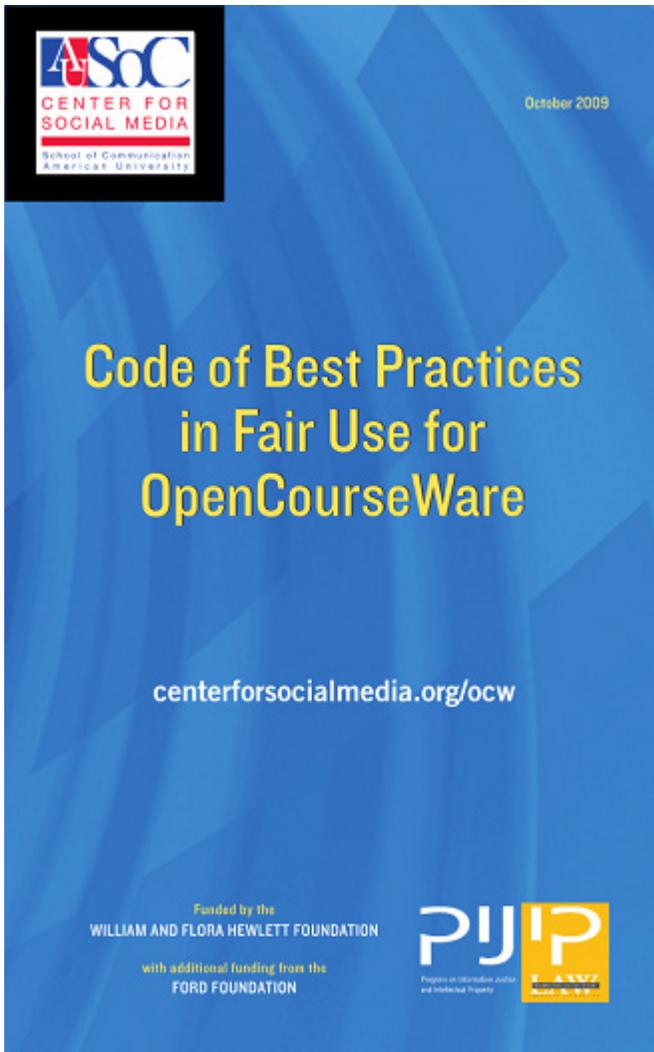


Figure 4. The completed OpenCourseWare Code. Center for Social Media and Social Impact, Code of Best Practices in Fair Use for OpenCourseWare, 2009

During the development phase of this Code, the support of the scholarly librarians and intellectual property attorney groups from each institution cannot be overstated. Some attorneys were members of the *OpenCourseWare Code's* drafting team while others were consulted during the drafting stage. Some librarians belonged to the drafting team while others were interview subjects. At some of the participating schools, for example, the OCW projects were run out of the libraries

themselves and the librarians provided helpful research data. If the document did not reflect the library's commitment to providing access to information freely and openly, it would not be useful to its mission of service. If the lawyers at an institution could not stand behind the interpretation of fair use laid out in the *OpenCourseWare Code*, that would leave the OCW just as vulnerable to infringement claims as before. Each iteration of the document included these stakeholders (librarians and intellectual property attorneys) at every step, in order to ensure buy-in from everyone.

Information about the roll out of the *OpenCourseWare Code* at each member institution is unavailable, but bringing the theory into practice at MIT, OCW staff began in earnest with the training of the staff in the winter of 2010. The publication team (that is, the team members who recruit and build courses) were used to the meticulous process of tracking copyright in each course in the form of "objects" (permissions, commissions, and citations). Now, they needed to learn about the copyright exception of fair use. As interview subjects for the research that lead up to the *OpenCourseWare Code's* publication, a few staff members knew this was on the horizon. Levels of understanding of fair use varied widely, and there was some anxiety about interpreting it incorrectly. Staff began by reading the *OpenCourseWare Code* itself. This was followed by a training session led by Weeramuni, where fair use was reviewed in its context of Section 107 of U.S. copyright law. It was emphasized that fair use is not a formula or checklist, but a weighing of the factors to see where the balance may lie. Using examples of images, charts, and text to make fair use determinations from some courses under development came next, and plenty of time was reserved for questions. There are always a lot of questions about fair use!

When new employees arrive at MIT OCW and are trained for their job, a significant amount of time is spent familiarizing them with the ins and outs of copyright. With regard to fair use, they receive an important message that fair use is "like a muscle;" that is, the more you think about how to apply it to your content, the easier it is to make judgements as to whether it works. In addition to receiving their own copy of the *OpenCourseWare Code*, they are encouraged to avail themselves of some of the tools on the university's Libraries website, such as the excellent Fair Use Quiz (Finnie, n.d.) or Library Guide (Dunn, 2014).

Having gone through the gamut of all this training, the publication team that is now in place at MIT OCW feels confident they have a working knowledge of how to judge what a fair use is and is not. The result is a portfolio of courses that are more complete and richer

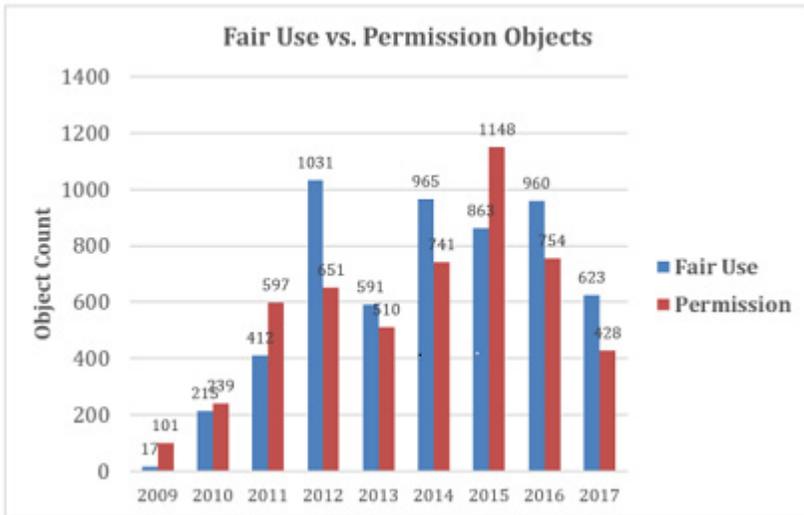


Figure 6. Fair use vs. permission objects. Data showing how fair use allowed for the increased inclusion of third-party content overtime

In just about every instance, a fair use object represents something that would otherwise have been left out of the course, or removed and replaced by an alternative that was not exactly what the faculty wanted in their course. During the research stage of creating the *OpenCourseWare Code*, a report was written called “Skeletons and Swiss Cheese,” (Aufderheide, 2009) which told the story of courses that were stripped bare of copyrighted materials and so full of holes as to render them practically useless as teaching materials and highly problematic for online users (Aufderheide & Jaszi, 2011). As the *OpenCourseWare Code* was written under the guidance of Aufderheide and Jaszi, each member of the group understood how best to interpret and apply fair use in a way that made the most sense for their respective open educational resource (OER). In particular for this university, the focus was the following: is the content being transformed to give it new and original meaning? Furthermore, is the amount being used appropriate for the pedagogical purpose?

This led to a break through decision for the university’s OCW. Since the fall of 2007 it had published a film studies class called “The Film Experience,” which necessarily included film clips as part of his teaching materials. Omitting them due to copyright concerns resulted in varying levels of user satisfaction. The professor was very unhappy with the outcome as well. Although the he was eager to publish it as it was, the university believed that it was too risky to show his complete video lectures—which included the clips—and risk copyright infringement

claims. After the *OpenCourseWare Code* was implemented in 2010, the course was published again with the complete set of video lectures, all film clips being used under a claim of fair use. At the end of each lecture there appears an end slate similar to that in Figure 7. This version of the course was published late in 2015. To date, no film studio or any other copyright holder has issued a take-down notice. The *OpenCourseWare Code* works!

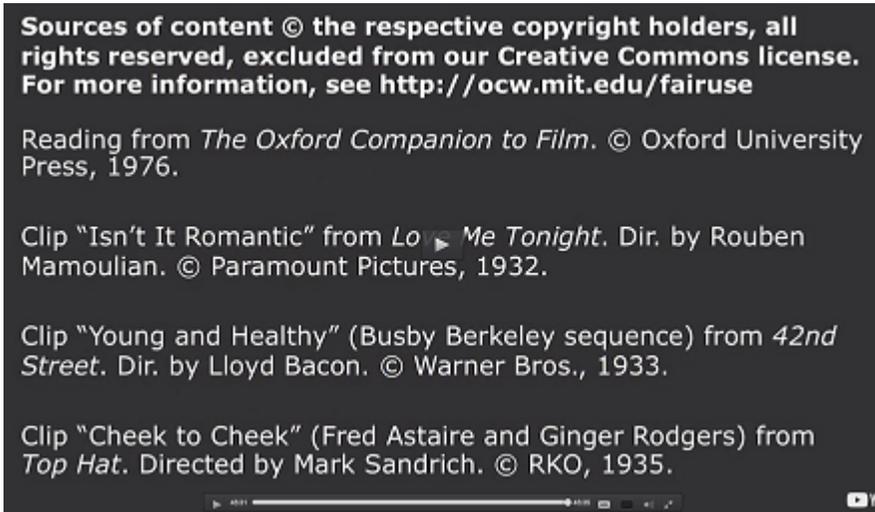


Figure 7. Endslate from Lecture 11: *The Musical*. David Thorburn. 21L.011 *The Film Experience*. Fall 2013. Massachusetts Institute of Technology: MIT OpenCourseWare, <https://ocw.mit.edu>. License: Creative Commons BY-NC-SA

Unfortunately, all of this good news about fair use in OER does not prevent misunderstandings by content holders or their representatives. For example, MIT OCW received a demand to sign a license and pay a fee ten years after an image demonstrating a scientific principle had appeared in a course. The use of the image met all of the factors of fair use, but the correspondent was insistent: “note that the use of an image within a different institutional context is not sufficient to constitute ‘transformative’ use—if it were, copyright would be all but meaningless” (Zoe, [no last name given], personal communication, April 13, 2016). The image remains in use and no further correspondence took place.

A second case occurred in 2015, when a publisher was trying to recover a “missing” permission invoice for the use of an image of a book cover that briefly appeared in a video lecture. The explanation provided by the OCW copyright team was that rather than agree to the publisher’s

terms and fee, it was determined that fair use worked for the material and that it relied on the *OpenCourseWare Code* to draw its conclusion. The correspondence that took place between the original email in 2011 and an attempt to collect a licensing fee in 2015 can be found in Appendix B and revealed how much the publisher did not know about fair use. Kevin Smith (2017) wrote about library work that “involves a distressingly common situation—a copyright holder who does not understand what the rights they hold actually are.”

Nevertheless, it remains important to focus on the amazing potential that fair use unlocks for content creators in the area of OER. Open educational resource producers are not publishing in the “walled garden” of a learning management system but in an open access World Wide Web environment that is free to all comers. That makes them no less eligible to take advantage of copyright exceptions than any other content-producing industry in the U.S. As long as the material is identified as fair use and exempt from copyright protection, and users are informed about these exceptions and under what this circumstances content could be reused, there are many opportunities to clear up the uncertainty and misunderstandings surrounding fair use in OER.

References

- Arnone, M. (2001). Princeton pulls out of high-profile distance-learning alliance. *Chronicle of Higher Education*, 48(13), A29.
- Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, and Women in Film & Video (Washington, D.C. chapter). (2005. November). *Documentary filmmakers' statement of best practices in fair use*. Retrieved from <http://cmsimpact.org/code/documentary-filmmakers-statement-of-best-practices-in-fair-use/>
- Aufderheide, P., & Jaszi, P. 2011. *Reclaiming fair use: How to put balance back in copyright*. Chicago; London: The University of Chicago Press, c2011.
- Carlson, S., & Carnevale, D. (2001). Debating the demise of NYUonline. *Chronicle of Higher Education*, 48(12), A31–32.
- A Committee of Practitioners of OpenCourseWare in the United States.(2009, October). *Code of bestpractices in fair use for OpenCourseWare*. Retrieved from <http://cmsimpact.org/code/code-best-practices-fair-use-opencourseware/>
- Creative Commons. (n.d.). Attribution-NonCommercial-ShareAlike 4.0 International license (CC BY-NC-SA 4.0). Retrieved from <https://creativecommons.org/licenses/by-nc-sa/4.0/>.
- Dunn, K. (2014, April 29). MIT libraries launches online fair use quiz for students [blog post]. Retrieved from <https://libraries.mit.edu/news/libraries-launches/15118/>
- Finnie, E. (n.d.). *Fair use quiz*. Retrieved December 1, 2017, from <https://libraries.mit.edu/files/ospcl/fair-use-quiz/>
- Goldberg, C. (2001, April 4). Auditing classes at M.I.T., on the Web and free. *The New York Times*. Retrieved from <https://www.nytimes.com/2001/04/04/us/auditing-classes-at-mit-on-the-web-and-free.html>
- Smith, K. (2017). Foibles and follies, part three [blog post]. Retrieved

September 27, 2017 from
<http://intheopen.net/2017/09/foibles-and-follies-part-three/>

Wiley, D. (n.d.). *Defining the 'open' in open content and open educational resources*. Retrieved September 24, 2017, from <http://opencontent.org/definition/>

Appendix A

License between MIT and Faculty to Use Their Intellectual Property on OCW

INTELLECTUAL PROPERTY LICENSE AND RELEASE FORM

MIT PARTICIPANT

COURSE NUMBER	COURSE TITLE
AUTHOR(S) NAME(S)	AUTHOR(S) TITLE(S)

I understand and agree to the following:

1. **GRANT OF LICENSE:** For good and valuable consideration, the receipt of which I hereby acknowledge, I (the “Author(s)”) grant to the Massachusetts Institute of Technology (“MIT”) a perpetual, royalty free, non-exclusive license to use, reproduce, copy, translate, modify display, create derivatives of and distribute via the MIT OpenCourseWare (“MIT OCW”) Web site and any other distribution channel and in any media now known or that is hereafter developed that is used by MIT OCW to distribute MIT OCW content, the materials provided by me to the MIT OCW program (the “Materials”).
2. **MIT OCW USE:** I understand and agree that through the MIT OCW program the Materials will be available to third parties who will be granted a perpetual, royalty free, non-exclusive license to use, reproduce, distribute, translate and modify the Materials solely for educational and non-commercial purposes.
3. **ACCURACY OF MATERIALS:** I acknowledge that I am solely responsible for the correctness of my Materials, their adherence to high academic standards, and their accurate reflection of the content and pedagogy of the course.
4. **ATTRIBUTION:** Unless I decline below to have my name associated with the Materials, MIT will require all users of MIT OCW to attribute any use of any of the Materials in a form that will include my name, my title or

status, the year the Materials were created (as indicated on the Materials), and any copyright information (as indicated on the Materials). MIT agrees that it will not post my telephone number, email address or any other contact information, and will post only MIT OCW contact information.

I	<input type="checkbox"/> choose <input type="checkbox"/> decline	to have my name associated with my Materials on MIT OCW.
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5. **STATUS OF COPYRIGHT:** MIT acknowledges that nothing in this license will constitute a transfer or assignment of the copyright in the Materials to MIT. MIT further acknowledges that I will continue to own any copyright that I currently hold in any of the Materials.

6. **AUTHORITY AND THIRD-PARTY PERMISSIONS:** I represent that, except where the Materials indicate otherwise, I am the owner of the copyright or other proprietary right in the Materials and that I have authority to grant this license. I further represent that I have identified and/or labeled all parts, items, and materials incorporated into the Materials that may be subject to a copyright or other proprietary right held by a third party. In the event an MIT employee or student is named in a third-party action regarding the Materials, MIT may indemnify the named employee or student, provided the employee's actions were made in good faith and within the scope of their duties or responsibilities. Where multiple MIT contributors have added materials through multiple offerings of the course over time, I have identified those contributors, where known. I understand that MIT will attempt to obtain any required permission or copyright clearances necessary for publication of the Material on MIT OCW and that I am not obligated to do so. If any of the Materials are based upon work that I completed from a grant or agreement sponsored by a third party, other than MIT, I represent and warrant that I have fulfilled any right of review or other obligations required by such contract or agreement.

Important: Unauthorized use of third-party copyrighted work is illegal, unethical, raises significant financial liability, and damages the reputation of MIT and its faculty. Contributors must exercise scrupulous care to identify the source of every third-party owned element in the Materials.

7. **STUDENT WAIVER:** If I am an MIT student, I understand that if I have elected above to authorize MIT OCW to publicly disclose my name and MIT title or status, as an author of the Materials to third parties

accessing the MIT OCW Web site, as part of the above-described rights granted by me to MIT OCW to use my Materials (which Materials may have been prepared by me as part of my class work at MIT), that I am waiving rights that I may have under MIT's Student Information Policy, as the same may be amended from time to time (as posted on MIT's web site) and the Family Education Rights and Privacy Act, to withhold this student information from disclosure, and that my grant of rights to MIT OCW is perpetual, and accordingly, this student information will remain available following the term of any class in which I may have created the Materials. I retain the right to revoke, in writing, this waiver and the rights granted to MIT OCW to use my name, title/status or Materials, with respect to any actions of MIT OCW occurring after the date it receives my revocation (understanding that MIT OCW has no obligation to address any uses of my name, title/status and Materials by any one accessing the MIT OCW Web site prior to this revocation).

I represent that I am 18 years of age or older, and have voluntarily chosen to participate in the MIT OCW program. The rights and obligations of this license shall be binding upon my heirs and successors in interest.

For MIT OCW Use Only

_____	_____
_____ AUTHOR	_____ FOR MIT
_____	_____
_____ NAME (PRINTED)	_____ NAME (PRINTED)
_____	_____
_____ TITLE	_____ TITLE
_____	_____
_____ DATE SIGNED	_____ DATE SIGNED

Thank you for participating in MIT OpenCourseWare!

Appendix B

Uncertainty from Publishers on the Meaning of Fair Use

Initial Correspondence with Rutgers University Press, May 11, 2010

Sent: 5/11/2010, 1:13 pm

Dear Content Owner,

I was unable to download the permission document on your website, therefore I am writing to you directly.

On behalf of the Massachusetts Institute of Technology (MIT) OpenCourseWare program (OCW), I am writing to ask your permission to use the material listed below. We are making this request on behalf of Professor Donald Sadoway, in connection with the course entitled, 3.091EV Introduction to Solid-State Chemistry.

Please use reference number OCW000010961 in all correspondence. Permission is requested for the following (see attached screenshot file 42477.pdf):

Book cover image

From Meikle, J. American Plastic: A Cultural History. Rutgers University Press, 1996.

Ref #: 6763-32429-22487-42477

To grant your permission, please approve the attached license (file OCW000010961.pdf).

You may print and sign the license and return it to our office; or simply reply to this email with the statement:

"I approve the terms of the MIT OCW IP License and Release Form." We would be grateful for a response by: 5/25/2010. If you are the wrong person to review this request, we would be grateful for any forwarding information you can provide.

MIT OCW is a web-based electronic publishing initiative described at <http://ocw.mit.edu>

MIT OCW is a free and open publication for students, instructors, and self-learners around the globe. We have published over 1800 courses from across the Institute, and receive an average of over thirty-five thousand visits per day. We have four translation partners, over one hundred and twenty mirror sites, and affiliate OCWs in more than a dozen countries as part of the Open Courseware movement.

Use of your content on OCW is governed by a Creative Commons license, details of which can be found here:

<http://ocw.mit.edu/OcwWeb/Global/terms-of-use.htm>

If you have any questions please contact me directly at (617) 253-2738.

Sincerely,

Lindsey Weeramuni

<http://ocw.mit.edu/>

Rutgers University Press to Weeramuni, July 12, 2011

Sent: Tuesday, July 12, 2011 9:17 AM

To: Lindsey Weeramuni

Subject: Outstanding Permissions

Dear Ms. Weeramuni:

It has come to our attention that payment for a permission request granted on **June 1, 2010**, is currently outstanding. The payment is for a reprint of the following material for Professor Sadaway's 3.091EV Introduction to Solid-State Chemistry course at MIT in Fall 2010.

The cover from *American Plastic: A Cultural History*, by Jeffrey L. Meikle, originally published by Rutgers University Press in **1996**.

The stipulated fee is \$0.32 per packet, or \$25.00, whichever is greater.

We ask you to please submit your payment to Rutgers University Press within **thirty (30) days** of the date of this letter. Please inform me if you require a separate invoice.

If you have already sent in your payment, please forward a copy of the check to RU Press.

Thank you for your consideration of this letter.

Sincerely,

[A]

(A, personal communication, July 12, 2011)

Weeramuni to Rutgers University Press, July 14, 2011

From: Lindsey Weeramuni <lweera@mit.edu>

Subject: RE: Outstanding Permissions

Date: 7/14/11 at 10:15 AM EDT

Thank you for your email regarding the cover from *American Plastic: A Cultural History* by Jeffrey L. Meikle. When you replied to our permission request on June 1, 2010, you stated that "Rutgers University Press does not participate in such programs." The terms you offered to us as an alternative to our proposed usage were more restrictive than we had originally requested and did not allow for publication on our web site. We therefore conducted an analysis in accordance with the Code of Best Practices in Fair Use for OpenCourseWare and determined that the fair use doctrine permitted us to retain the image in the course. Please note that, in accordance with our standard practice, we have given full attribution to the image and have excluded it from the Creative Commons License that applies to the video in which the image appears. As a result, we will not be paying the permission fee you refer to below.

Please let me know if you have any further questions.

Rutgers University Press to Weeramuni, July 18, 2011

From:[A]

Sent: Monday, July 18, 2011 8:53 AM

To: Lindsey Weeramuni

Subject: Re: FW: Outstanding Permissions

Ms. Weeramuni,

It's unfortunate that there's been a misunderstanding regarding this permission.

As an academic press, we would never grant free lifetime permission to anyone. We granted electronic rights to you based on the permissions request you sent, which just asked for electronic course use. It wasn't clear that this request also meant the image would be published on a website, or that the request was to be granted gratis.

If you wouldn't mind, just so we can understand better what you mean by the fair use doctrine, telling me where on the website page "Code of Best Practices in Fair Use for OpenCourseWare" it says that you could retain the image?

I apologize if our terms were in any way confusing. Please let me know if you have any further questions.

Thank you,

(A., personal communication, July 18, 2011).

Weeramuni to Rutgers University Press, July 20, 2011

From: Lindsey Weeramuni <lweera@mit.edu>

Subject: RE: Outstanding Permissions

Date: July 20, 2011 at 11:09:58 AM EDT

To: [A]

Dear Ms. [A]

The request I sent last year was to include the image in the course as published on the MIT OpenCourseWare (OCW) website. As explained in the letter, OCW is a free and open-access online publication available to anyone around the world. It's not unusual for copyright holders to choose not to grant permission under the terms we request. Since you stated in your reply that Rutgers University Press doesn't participate in such programs, we considered whether fair use would allow us to include the image in the online lecture. You can see it at 48:33

in fair use would allow us to include the image in the online lecture. You can see it at 48:33 in the video here [*sic*]: <http://ocw.mit.edu/courses/materials-science-and-engineering/3-091scintroduction-to-solid-state-chemistry-fall-2010/29-polymers-synthesis-properties-applications/> Click on the Lecture Video item to expand the player.

As we considered this, we were guided by the two common questions in the “FAIR USE” section of the code here <http://centerforsocialmedia.org/ocw>, as well as the four factors of Sec 107 of the Copyright Act. We concluded that the cover of the book appearing as a low-res image captured on a screen projection for several seconds in a lecture hall was both transformative and an amount of material taken appropriate to the re-use. The nature of the work, i.e., the cover of a book about plastics, is in line with the topic of the lecture in which it appears. Only the cover was shown, not any of the content inside the work itself. It appears on the screen for just a short time as the professor recommends that his students read the book to further understand the subject of the lecture, causing no negative effect on the potential market for either the cover image or the book itself. I hope this clarifies the situation. If you would like to discuss it further, please call or email me at your convenience.

Best regards,
Lindsey Weeramuni

Rutgers University Press to Weeramuni, November 3, 2015

On Nov 3, 2015, at 12:04 PM, [E] wrote:

Dear Lindsey,

I am following up on a permissions issue that has been neglected for several years. I apologize for the very long delay.

My predecessor granted MIT OpenCourseWare permission to replicate one of our copyrighted images for the one-time fee of \$50. This fee was not paid and when my predecessor followed up, you told her that MIT would not be paying the fee.

I am following up to ask that you do pay the fee or remove the image from the course. We routinely charge for use of our jackets, covers, and other figures and tables. It is simply not fair for us to make an exception for this image, especially as the course is using the image in on [*sic*] an open access site in perpetuity.

I have attached the original invoice for your reference. Thank you for your help, and please let me know if I should contact someone else at MIT.

Best,

(E. , personal communication, November 3, 2015).

Weeramuni to Rutgers University Press, November 3, 2015

Subject: Re: Outstanding Permission notice

Date: November 3, 2015 at 1:00:53 PM EST

To: [E]

Dear [E],

Thank you for following up on this matter. It was indeed a long time ago!

As I explained to [A] in an email of 7/20/2011, we determined that use of the work in question met the standard for the copyright exception of fair use in Sec 107 of the Copyright Act. Since this standard does not require a license to grant permission, no payment of a fee is needed. I will directly forward the correspondence between [A] and me from four years ago, to which I received no reply.

Please let me know if you have additional questions.

Sincerely,

Lindsey Weeramuni

Rutgers University Press to Weeramuni, November 3, 2015 (2)

Date: November 3, 2015 at 2:11:13 PM EST

To: <lweera@mit.edu>

Subject: Re: Outstanding Permissions

Dear Lindsey,

Thanks for passing this along - it clears up a lot of questions. I've looked at the footage and while I agree that the use of the specific image falls under fair use, I'm uncomfortable with the fact that MIT seemed to decide it fell under this clause without consulting [A]. If you should ever need to seek permission for a similar situation, please let me know if you wish to use the item in question under fair use. That way, I can formally approve (or reject) a request for fair use and make a record of it, instead of following up on a fee only to learn the permission in question was already being used under fair use guidelines.

Again, thanks clearing this up so quickly.

(E., personal communication, November 3, 2015).