

What's Fair? OER, Copyright, and Fair Use

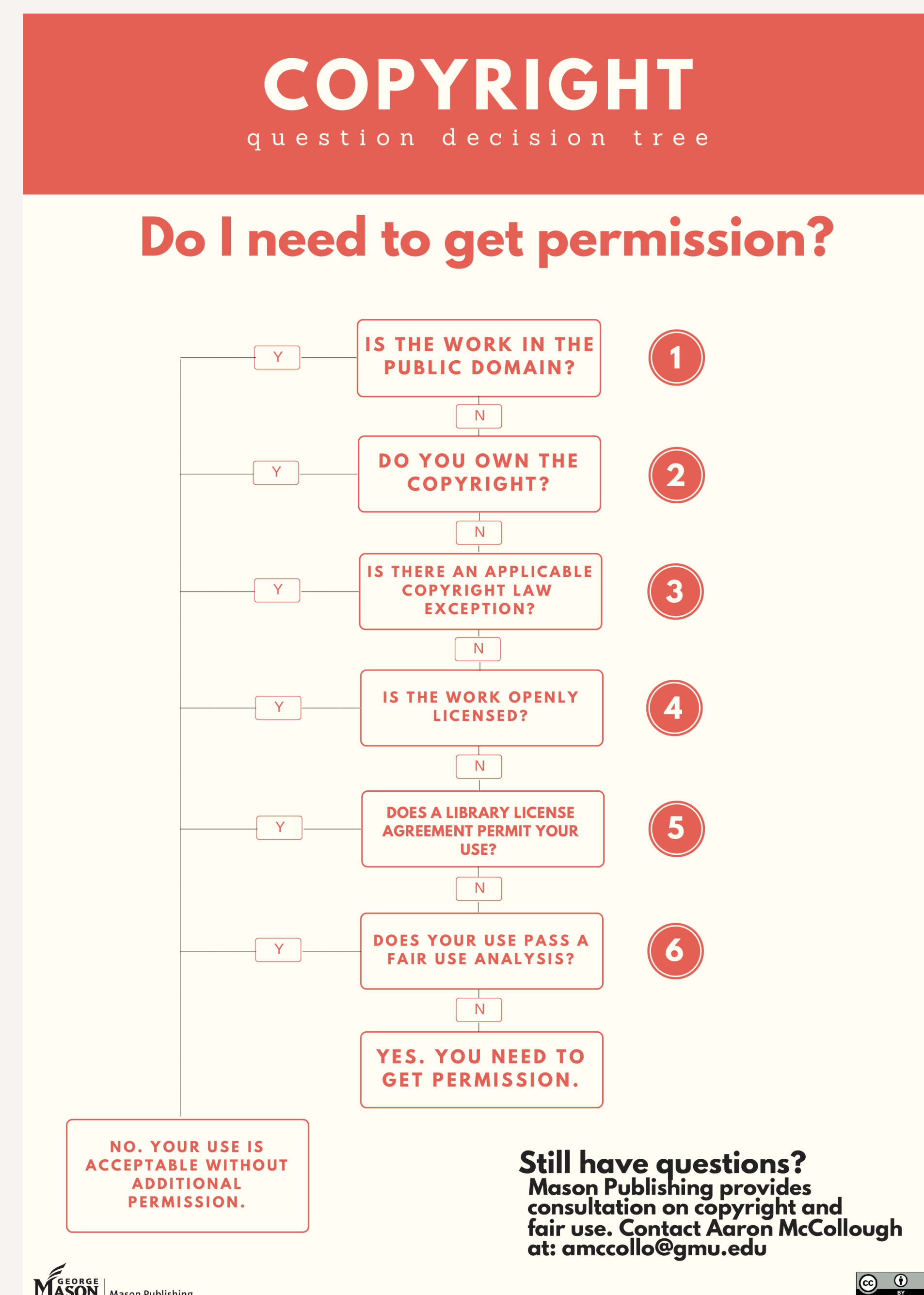
OERs are free, but they can include third-party work that's not free. Here's how to think about copyright when designing your own OER content...

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ABSTRACT

OER creators may be tempted to “reuse” existing content without giving much thought to the copyright implications, but improperly licensed content in OER can implicate student users in infringement. So it's important to think about permissions.

Fortunately, using creative-commons-licensed material and following best practices in fair use can help us minimize risk without forcing us to exclude important content.



What CC-licenses Communicate

The six CC licenses expressly permit specific uses without further permission. They also prohibit specific uses without permission.

All CC licenses permit redistribution as long as proper attribution is supplied. Licenses including SA, NC, or ND constrain adaptation and commercial reuse rights without additional permission.

	Adapt?	Redistribute?	Attribution Required?	Commercial Use OK?	Overrides Fair Use?
PD No Rights Reserved	YES	YES	NO	YES	NO
PUBLIC DOMAIN	YES	YES	NO	YES	NO
CC BY	YES	YES	YES	YES	NO
CC BY SA	YES*	YES	YES	YES	NO
CC BY NC	YES	YES	YES	NO	NO
CC BY NC SA	YES*	YES	YES	NO	NO
CC BY ND	NO	YES	YES	YES	NO
CC BY NC ND	NO	YES	YES	NO	NO
CC BY SA ND	NO	NO	—	—	NO

* under some licensing terms

CC-licenses & Fair Use are Compatible

Applying a CC license to OER you develop will not interfere with the copyright of any third-party material you've included under fair use.

For the sake of clarity, it is best to identify separately elements of the work that remain the intellectual property of others and are therefore not included in the CC license.

For example, a series of brief YouTube clips used under a fair-use determination to illustrate a key point about Hollywood violence should be properly attributed and identified as external to the license applied to the rest of the work.

How to Use Fairly

By following a rigorous set of legal guidelines called the “four factors” in accordance with documented, discipline-specific best practices, we can evaluate what's “fair” with reasonable confidence.

FAIR USE
four factor analysis

IS THIS A FAIR USE?

- PURPOSE & CHARACTER OF USE**
 - Criticism, comment, news reporting, teaching, scholarship, research
 - Non-commercial character
 - Transformational character
 - Other purposes
 - Commercial character
 - Non-transformative character
- NATURE OF ORIGINAL WORK**
 - Already published
 - More factual than creative
 - Purpose differs from that of intended use
 - Never published
 - More creative than factual
 - Purpose similar to that of intended use
- AMOUNT USED**
 - Not the “heart” of the work
 - Consistent with published field-specific codes of best practice
 - The “heart” of the work
 - More than absolutely necessary to achieve purpose
- EFFECT OF USE**
 - Intended use not currently being commercially exploited
 - Significant potential market for intended use does not exist
 - Proper attribution provided
 - Intended use is currently being commercially exploited
 - Significant potential market for intended use does exist
 - Lacks proper attribution

Still have questions? Mason Publishing provides consultation on copyright and fair use. Contact Aaron McCollough at: amccollo@gmu.edu

Factor by Factor

Since copyright law stipulates that each of the four factors must be weighed equally by judges in fair use disputes, it's important to do the same each time we contemplate incorporating work under fair use.

Factor 1: Purpose

When it comes to OER, this factor is somewhat clearer than most. In non-profit, educational contexts, most OER uses should have a high level of “fairness” under factor 1.

Factor 2: Nature of the Original

Things to watch out for especially under factor 2 include previously unpublished work. Also, the more creative (and less purely factual) a work is, the lower the level of “fairness” under this factor.

Factor 3: Amount

Economical use of cited material is conventional in academic work. The level of “fairness” under this factor is tied to how essential the amount used is to achieving the purpose (from factor 1).

Factor 4: Effect

Because of the robust market for educational materials, OER creators must seriously consider whether their use of material in a freely-available resource could pose a significant threat to the potential market or value of the original.

Degrees of Fairness

Fairness cannot be determined with certainty, except in court. It is wise to document your evaluation and the data you use to support it with the help of a tool like the Fair Use Evaluator @ librarycopyright.net

Consult Your Librarian

Copyright law (section 504c2) significantly shields teachers in non-profit settings from statutory damages in cases where a good-faith effort has been made to assess fair use. Librarians can help in the effort!