

Copyright and Distance Learning in the COVID-19 Environment

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The COVID-19 pandemic has caused most educational institutions to migrate face-to-face classes to an online environment. Among the myriad logistical and technological considerations accompanying this move to online courses, there are significant questions as to legality of display of copyright-protected materials in these new virtual classrooms.

The Copyright Act of 1976 provides a broad exemption to the exclusive rights of copyright ownership to permit teaching in a face-to-face classroom environment. 17 U.S.C. Section 110 provides that the following is not a violation of copyright: "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made . . ." As long as the copy of the work was lawfully obtained, displaying the work in a physical classroom setting is permitted. This broad exemption permits teachers to display or perform images, music, film and other copyright-protected works without needing to obtain a license from the copyright owner or rely on the complicated fair use exceptions.

This exemption does not apply to online courses. In response to the growth in distance learning and the lack of guidance regarding educational use of works outside of physical classrooms, in 2002, Congress enacted the Technology Education and Copyright Harmonization (TEACH) Act. The TEACH Act applies to accredited nonprofit educational institutions and allows the performance and display of certain copyright-protected materials by digital transmission. Due to the increased potential for abuse and infringement in the online environment, the use of works under the TEACH Act is subject to more requirements than the uses permitted under the face-to-face teaching exemption.

Institutions that regularly provided online courses are likely familiar with the more stringent requirements under the TEACH Act, and pre-existing online curriculum materials were likely developed in compliance with the TEACH Act. However, for many institutions, the abrupt transition to distance learning in the time of the COVID-19 pandemic has led to a number of face-to-face classroom experiences now being offered in a



distance learning setting. Many of these courses are likely not in compliance with the TEACH Act and institutions risk claims of copyright infringement from content owners.

The current environment is essentially unprecedented and, as a practical matter, courts may consider uses in COVID-19 distance learning environments to be "fair use" given the circumstances of the pandemic. In response to the crisis, some librarians and educators are arguing that the current circumstances dictate that materials that are generally unavailable for unlicensed use should be available under the doctrine of fair use. See this article and letter.

Separately, recognizing the disruption caused by lack of access to libraries and print sources, certain providers of online resources may also be temporarily broadening access to their materials, particularly those which relate to COVID-19 or which are particularly crucial for use by students. In some cases, copyright owners are providing temporary licenses or permissions to use their works in online settings during the crisis. For example, author J.K. Rowling has granted an open temporary license for schools to read the Harry Potter books aloud and post the videos during the 2019-2020 school year. See "Harry Potter at Home: Temporary Open Licence for Teachers." These measures will help to smooth the difficult transition from in-person to online instruction, but as time passes, these materials may become restricted again.

The immediate extenuating circumstances will eventually end and, once that happens, institutions will need to go back to their standard policies and their precautions regarding copyright infringement. As educational institutions continue to operate online in order to encourage social distancing, and possibly adopt more robust online learning options on a permanent basis, the TEACH Act requirements and careful consideration of the use of copyright-protected works will become more important than ever.

For more information, contact Labor, Employment and Higher Education Practice Group Chair Kathryn Nash or your regular Lathrop GPM contact.