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FAIR USE AND DISTANCE LEARNING IN THE TIME OF COVID-19

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Copyright laws in the United States were created when nearly all duplication of content was done by corporate entities, schools or government offices in specific locations. While laws protecting creative works have been modified over time to envelop the Internet age, most primary and secondary educational institutions (and many colleges and universities) have not had to consider a scenario where all students attend classes remotely, through synchronous virtual classrooms and videoconferencing technology.

Due to the impact of COVID-19 nationwide (and worldwide), educators are now faced with reviewing and rethinking their obligations as licensees of educational content from a variety of sources and, in turn, their downstream use policies that dictate how teachers can teach, and how students can learn. The COVID-19 impact as caused rapid modifications of policies from well-known educational licensors, like J.K. Rowling, Brad Meltzer and children's book creator Mo Willems of *Don't Let the Pigeon Drive the Bus* fame. Willems is working with the Kennedy Center, where he is the author in residence, to teach children how to draw, and answer their questions about his books. Meltzer has granted a broad license for teachers to use his *I Am* books in their distance-learning projects, and J.K. Rowling took to Twitter to "help teachers reach kids at home by relaxing the usual license required to post videos of themselves reading Harry Potter books".[1]

Whether or not licensors are loosening their guidelines, the pandemic is stretching our traditional notions of copyright fair use. For example, teachers required to get a license to post a video of themselves reading a protected book to their students, even if that video is shared solely on a school's secure networks or closed educational platforms? Do third party virtual classroom and videoconferencing systems qualify as a school's secure network or closed educational platform such that educators are in not breach of their licenses? These are questions that educators have been immediately forced to examine as they attempt to maintain continuity and quality of education in pressing times.

On March 13, 2020, an affiliation of copyright specialists affiliated with libraries around the US released a statement[2] in which they asserted that "It is evident that making materials available and accessible to students in this time of crisis will almost always be fair use. If we are being thoughtful in our analysis and limiting our activities to the specific needs … during this time of crisis, copyright law supports our uses." Their position is that the fair use doctrine "accommodates the flexibility required by our shared public health crisis, enabling society to function and progress while protecting human life and safety."

On March 24, 2020, the Ninth Circuit issued a ruling in *Tresona Multimedia, LLC v Burbank High School Vocal Music Association* that explicitly stated that "the defense of fair use, if applicable, should cover "teaching" whether in a private or public setting." The ruling did not distinguish between face-to-face education and distance learning, although it noted that "the fair use defense renders a use noninfringing," The ruling also looked to *Bill Graham Archives* to state that a copyright holder cannot prevent works from being deemed fair use solely because it licenses its own creative works. This case could be useful to educators who seek to make fair use of third-party content in their newly virtual classrooms, and those who encourage their students to create transformative works as assignments this spring, and beyond.

Section 17 U.S.C. § 110(1) of the Copyright Act states that “the performance or display of a work by instructors or pupils in the course of the face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction” is non-infringing. Courts have never been asked to answer whether face-to-face teaching activities can be conducted via the internet, but over the last few years, educators in classrooms around the country have provided access to students who are temporarily or permanently unable to be in a classroom, so they can keep up with their classes. No such situation has resulted in a lawsuit by a copyright owner against a school, but those situations parallel the way millions of students have already started learning new material. It is reasonable to conclude that internet-based teaching activities of public schools and non-profit educational institutions qualify as a “similar place devoted to instruction”, and to the extent they might not, the “purpose and character” element of a Fair Use analysis should permit teachers to parallel their in-classroom teaching activities online without worrying that they are infringing on someone’s copyright. In other words, educators probably don’t need J.K. Rowling’s permission to read portions of the *Harry Potter* books with their students, and discuss passages in online classes, any more than they need that permission to do so in a traditional brick-and-mortar classroom.

The attorneys of Berger Singerman are available to work with schools at any grade level, to analyze educator plans and assess whether specific plans are permitted under the Copyright Act or are non-infringing because of Fair Use carve-outs. We are also available to work with copyright owners to draft policies and procedures, as well as license language, to protect the copyrights and ancillary trademark rights during these unexpected times.

For those educational supervisors and managers who still wish to use only licensed materials, *T.H.E*. Journal is updating their list of resources daily, here.

The COVID-19 pandemic is creating rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this post is issued. We therefore encourage you to monitor our website, review our future posts and generally remain alert for additional updates or modifications to laws and regulations.

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