

COVID, Copyright and Education: Legal Issues in Remote Learning

For the educator who wishes to develop his or her own lesson plan and course materials, careful compliance with the TEACH Act is the safest route to avoiding copyright problems, says Rollin Ransom, the managing partner of Sidley Austin's Los Angeles office.

By **Rollin A. Ransom** | August 18, 2020



Rollin A. Ransom, managing partner of Sidley Austin's Los Angeles office. (Courtesy photo)

On July 17, Gov. Gavin Newsom announced that, barring substantial improvements in the COVID-19 infection levels in California, public and private K-12 schools in most school districts would not be permitted to open in the fall, and would instead be required to educate students remotely through “distance learning.” This announcement followed the May decision by California State University that most classes in the fall would be held online. Since CSU’s announcement, the University of California campuses have likewise announced that many fall classes would be conducted remotely, though certain campuses have indicated that at least some in-person classes would also be offered. These announcements come amid a nationwide debate regarding the wisdom and safety of in-person education and the efficacy of remote education.

But beyond the question of whether classes should be conducted remotely is how they can be conducted remotely, consistent with the law. Copyright law affords broad protection to original works of authorship, including protection against the unauthorized reproduction, display and public performance of copyrighted works. However, the Copyright Act also includes limitations on the exclusive rights granted to copyright owners, including limitations relating to education.

When the current version of the Copyright Act was adopted in 1976, it included a broad-based exemption for “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,” as well as a more limited exemption for the forms of distance education existing at the time (i.e., instructional television or radio broadcast). However, neither of these exemptions was sufficient to insulate online

learning from infringement claims, given the digital technology underlying such learning.

Accordingly, in 2002, recognizing the potential for the growth of “digital distance education,” Congress passed the Technology, Education and Copyright Harmonization (TEACH) Act, amending the Copyright Act to expand the then-existing exemptions to include online learning.

As a general matter, the TEACH Act permits the performance of a nondramatic literary or musical work (e.g., reading an entire poem or performing a piano composition) and “reasonable and limited portions of any other work” (e.g., reading an excerpt of a novel or play, performing an excerpt of an opera, or playing an excerpt of a sound recording), as well as the “display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session,” in connection with online distance learning; see 17 U.S.C. Section 110(2). The act also generally allows making digital reproductions to the extent necessary to facilitate authorized performances and displays. However, the rights under the TEACH Act are subject to several limitations.

First, the copy of the work must have been “lawfully made and acquired.” In other words, material that is simply downloaded by the educator from the internet for incorporation into an online learning curriculum may not qualify, if the original material is itself infringing.

Second, the performance or display must be made by, at the direction of, or under the “actual supervision” of an instructor “as an integral part of a class session,” and it must be “directly related to and of material assistance to the teaching content.” That is, the exemption requires the direct and meaningful

involvement of a teacher, and playing music for mere entertainment or displaying images to “pass the time” does not qualify.

Third, the exemption applies only to accredited nonprofit educational institutions—for-profit educational institutions need not apply.

Fourth, to the extent technologically feasible, the transmission must be limited to students “officially enrolled” in the course—open lectures available to all don’t fall within the scope of the act. Moreover, the school must apply technological measures that prevent students from downloading or further disseminating the work. That is, the exemption facilitates educational display or performance of copyrighted works; it does not authorize distributing “coursepacks” or other printed materials, nor does it authorize distributing recorded lessons capable of being viewed offline.

Fifth, while the TEACH Act generally authorizes digital reproduction of works to the extent necessary to facilitate the authorized display or performance of those works, that assumes the works are available in digital format (and, as noted above, that the digital source material is “lawfully ... acquired”). Analog works may be converted to digital format only if they are not already available digitally (i.e., a teacher can’t simply scan a document that he or she could legitimately obtain in digital form), or if the only digital versions are copy-controlled in a manner that prevents the use authorized under the TEACH Act.

Finally, the exemption does not apply to a work “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.” In other words, the exemption does not allow educators to copy and use others’ online teaching materials, as opposed to developing their own.

Notwithstanding these limitations, the TEACH Act is a powerful tool for educators to develop and deliver online lessons. To be sure, there are other paths to avoiding infringement. The Copyright Act authorizes the “fair use” of a copyrighted work, and specifically calls out “teaching” as one use that may be fair. However, it can be difficult to predict the outcome of this defense, which is based on consideration of a number of factors, making it a less reliable means of proceeding. And, it may be possible to license educational materials—either from a company that prepares such materials specifically for remote learning, or under a Creative Commons or other free, open license. But, for the educator who wishes to develop his or her own lesson plan and course materials, careful compliance with the TEACH Act is the safest route to avoiding copyright problems.

Rollin A. Ransom *is the managing partner of Sidley Austin’s Los Angeles office and head of its Greater Los Angeles litigation group. He can be reached at rransom@sidley.com.*

This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content therein does not reflect the views of the firm.

Article Link: <https://www.law.com/therecorder/2020/08/18/covid-copyright-and-education-legal-issues-in-remote-learning/>

Reprinted with permission from the August 18, 2020 issue of The Recorder. © 2020 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.