

## **Copyright: Infringement, Remedies, and Defenses in a Pandemic Environment**

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# Copyright: Infringement, Remedies, and Defenses in a Pandemic Environment

## Abstract

The abrupt shift of universities to an online environment has heightened the awareness and impact of the copyright law. The issue that the academe and faculty face is whether synchronous presentation of instructional material is in violation of the copyright laws and if a viable remedy or defense is available. Pre-Pandemic, educators teaching in the traditional in-class format used the Fair Use doctrine in deciding on using the copyrighted work to be presented in class whereas those in the online remote paradigm faced a different set of barriers. Congress enacted the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act) to overcome the barriers for those educators delivering courses in asynchronous mode using copyrighted instructional materials.

The intent of the article is to discuss the premise and fundamentals of the Copyright Law, remedies, and defenses and whether the public policy exemptions afforded to faculty can be extended to the remote teaching synchronous environment created by the COVID-19 Pandemic.

## Introduction

Educators delivering instruction in the traditional in-person format shifted to synchronous remote online format beginning in March 2020 and some have gradually returned to a mixed format, whereby a percentage of the course is delivered in-person. At the onset of the pandemic, materials purchased and licensed for in person instruction became the materials in online instructional capacity.

The central question to answer is whether instructional materials purchased and licensed for in-person delivery may still be utilized when the course offerings are moved to an online remote format without violating the “Fair Use” doctrine or the Technology, Education and Copyright Harmonization Act of 2002 [1] (TEACH Act).

## Copyright act of 1976

Congress enacted changes to the previous law of 1909 [2] to “harmonize rules such that federal copyright protection would be granted as soon as the original work is created by the author and fixed in a tangible medium of expression” [3]. Whereas “Fair Use” applies to all educators employed by for-profit or nonprofit institutions the TEACH Act specifically applies only to educators of a nonprofit institution. In either case, copyright ownership will always vest in the author or the institution in cases of work-for-hire [4]. Whether the friendly copyright policy between academe and faculty will survive the post-pandemic academic environment only time can answer. Academe and faculty have a special relationship whereby faculty is deemed to own the copyright to all instructional work or courseware developed:

**In accord with academic tradition**, (emphasis added) ..... does not claim ownership

to pedagogical, scholarly, or artistic works, regardless of their form of expression [5].

## Infringement and Defenses

The Copyright Act of 1976 (as amended) [6] provides exemptions or safe harbor; i.e. defenses, for educators when copyrighted material is utilized to create instructional material for classroom use as well as facilitating instructional delivery. Whether face-to-face or remote online delivery faculty may take advantage of one exemption the so called “classroom face-to-face exemption” [7] commonly referred to as the Fair Use exemption:

“Fair Use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances” [8]

Adopted at a time when synchronous and asynchronous delivery was not as common as today. In response to the need of educators to use course materials in the digital delivery environment, the copyright law was amended in 2002 to acknowledge the need for exemptions from copyright infringement. The result was the adoption of the TEACH Act [9]

The TEACH Act strikes a balance between the institution and the copyright owner by providing a safe harbor provision for non-profit institutions, publishers, and libraries when instructional material is delivered in various modes whether blended [10] or live. The safe-harbor provision enables the use of licensed instructional materials intended for synchronous and asynchronous. It is of interest to note that the TEACH Act does not specifically refer to synchronous or asynchronous whereas Senate Report of the 107<sup>th</sup> Congress references both:

“For our nation to maintain its competitive edge, it will need ..... to reach all students ..... on campuses .. workplace ... home and **at times selected by students to meet their needs.**” [11] (emphasis added)

In fact, enrolled students of an online course or program may be on-campus or at a remote location. Additionally, central to the online delivery system are the course management systems utilized in managing content and delivery of course material. Prior to the TEACH Act electronic transmissions of copyright protected material fell outside the educational exemptions because those exemptions applied specifically to face-to-face classroom settings. What is most important to recognize is the fact that any original work specifically authored for the online environment is not protected by the TEACH Act [12]:

“Section 110(2) **only applies to accredited nonprofit educational institutions. The rights granted do not extend to the use of works primarily produced or marketed for in-class use in the digital distance education market**” [13] (emphasis added)

And must receive permission to use. However, the “Fair Use” exemption may apply so long as the four factors [14] are complied with to overcome the requirement of TEACH for materials specifically designed for online delivery.

a. Blurred Lines- work for hire

The pandemic caused all educators to move their skill set and equipment to their residence. This arises as to copyright ownership of material used and/or prepared by the faculty member, presumably the original author of the work used for delivery of course content. Whereas, prior to the pandemic, course content was developed and delivered by faculty the pandemic and post-pandemic environment may change the existing relationship between faculty and university as it related to copyright ownership. In general, copyright ownership vests in the author of the work unless it is a “work for hire” [15]. A work for hire is one in which the employee develops the material in the course of their duties [16].

The “academic tradition of copyright ownership” [17] vesting in the faculty while retaining a non-exclusive royalty free license to use may change if the remote work environment becomes a norm and/or faculty become required to prepare all coursework for synchronous and asynchronous delivery at the specific direction of the university. Currently, universities look to remote and distance learning through different lenses. During the pandemic faculty have prepared work for synchronous delivery and will most likely retain copyright ownership under the long-standing academic copyright policy. However, for distance learning faculty in which the work is developed specifically for the online asynchronous delivery copyright ownership will likely vest in the university as a “work for hire”. As the pandemic marches on these lines may blur and the university may modify their copyright policy to include all work prepared for the purpose of delivering course content in any format and/or any platform including learning management systems.

b. Bayh-Dole Act: Federal Sponsored Contracts

Intellectual property (IP), specifically patents, generally vests in the creator(s) when not within their scope of work; i.e., “work for hire”. The Bayh-Dole Act [18] provides that inventions arising from government sponsored research are to be used to promote their utilization as well as to “meet the needs of the government and protect the public against nonuse or unreasonable use of the inventions.” [19] To this end, the Act addresses patent ownership [20] as part of the funding agreement outlining the respective rights of the contractor (business or non-profit institution) including the retention [21] of the patent by the non-profit institution or contractor.

c. Remedies

The copyright owner has several options available when infringement occurs. For non-online infringing actions the owner may file for civil remedies of injunctions, impounding, and disposition of infringing articles and if successful is entitled to damages and profits [22]. An injunction is a court order preventing the infringer from continuing to use of the material. In addition, while the copyright action is proceeding the court may order seizing and taking legal custody [23]. As part of the final judgment the court awards actual or statutory damages. The

copyright owner may select statutory damages so long as, if chosen, “must be selected at any time before final judgment” [24]. Actual damages may be somewhat difficult to assess whereas statutory damages can be assessed in an amount not more than thirty-thousand dollars unless the infringement was willful whereby the copyright owner is entitled to not more than one-hundred-fifty thousand dollars and may face a criminal case within five years from the date of the infringing action [25]. In the event the infringer is utilizing the digital environment, the Digital Millennium Copyright Act (DMCA) [26] provides the proper owner or the online service provider (OSP) the opportunity to issue a “take-down notice” to remove infringing content without the need for litigation [27]. In addition, DMCA §512(a) provides safe harbor for OSP’s, including universities acting as OSP’s from monetary liability in exchange for cooperating with copyright own to remove the infringing content [28].

## Conclusion

Copyright law is public policy and permanently enshrined in the United States Constitution as Article I, Section 8, Clause 8, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." In certain instances, the law has over time provided for built-in exemptions in favor of society or identifiable group(s) such as educational institutions. As Senate report aptly states, “education is the means by which we develop our nation’s human resources.” In preparing for the post-pandemic academe, institutions will likely review copyright policies and prepare a robust portfolio of programs and courses for anytime anywhere delivery in the event of another national emergency requiring an immediate shift to synchronous. This preparatory work may alter the academic tradition of faculty retaining copyright ownership of their instructional materials especially if the work is intended for asynchronous delivery.

## References

- [1] 17 U.S.C. § 110(2), § 112.
- [2] 35 Stat. 1075 (Pub.L. 60-349).
- [3] 17 U.S.C. §101.
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- [5] "[Online]. Available: <https://doresearch.stanford.edu/policies/research-policy-handbook/intellectual-property/copyright-policy.>," [Online].
- [6] 17 U.S.C. § 107: <https://www.copyright.gov/fair-use/more-info.html>.
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- [9] *S.Rept. 107-3.1*
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- [12] <https://www.copyright.gov/fair-use>
- [13] 17 U.S.C. §§101, *et seq.*
- [14] 17 U.S.C. §110(1).
- [15] 17 U.S.C. §101(1).
- [16] "<http://web.mit.edu/copyright/policy.html>," [Online].
- [17] 35 U.S.C. §200.
- [18] *Id.*
- [19] 35 U.S.C. 202(a).
- [20] 35 U.S.C. 202 (c)(1) *et seq.*
- [21] 17 U.S.C. §501-504.
- [22] *The Digital Millennium Copyright Act of 1998 (2002)*; 17 U.S.C. §512.
- [23] 17 U.S.C. §503.
- [24] 17 U.S.C. §504.
- [25] 17 U.S.C. §512.
- [26] 17 U.S.C. §506.
- [27] 17 U.S.C. §512(a).
- [28] *Id.*

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- [16] "<http://web.mit.edu/copyright/policy.html>," [Online].
- [17] *35 U.S.C. 200.*
- [18] *Id..*
- [19] *35 U.S.C. 202(a).*
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