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### Copyright Concerns for Educators: Online Learning Post Pandemic Effect

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#### Abstract

Online distance education was once a process that was not easily been accepted by students, even by the educators, but when the pandemic strikes, they had to adopt and adapt the process in order to gain knowledge. The COVID-19 has resulted in shutting down schools, including tertiary institutions, all across the world. Consequently, education changed dramatically, and the mode of teaching was done remotely and on a digital platform. One of the adoptions of online learning involves using numerous online platforms and inserting interactive programs, music, animated graphics, photos in the teaching material to attract the interest of students. These types of works are, more often than not, copyrighted works that belong to someone. Generally, a license or permission must be sought before these works can be used by anyone. The permission or license, once granted, would involve a licensing fee or royalty payments to the copyright owner. However, this article looks at the law relating to the copyright exploitation awareness in the context of the law of intellectual property and the exceptions to this law, in particular, the scope of the hybrid fair dealing defence for education. This paper employs a doctrinal analysis using secondary data from academic journals, books, and online databases. The findings will respond to the legal framework for the understanding of copyright exploitation and its exception in the post-pandemic era.

**Keywords:** copyright, fair use, fair dealing, online learning

#### Introduction

Coronavirus COVID-19 has spread over the globe, causing fundamental changes in social interaction and organization. One sector that has not been spared is the education sector (Murphy, 2020). Article 26 of the Universal Declaration of Human Rights declares that everyone has the right to education and that technical and professional education shall generally be made available (United Nations, 1948). Education systems around the world are responding to the epidemic with "emergency eLearning" guidelines, indicating a speedy move from face-to-face classes to online learning platforms. As part of crisis response measures, educators had no other option but to shift to the emergency online learning mode overnight. With the advancement of information technology, educators can quickly enhance their lectures with unique content that engages students. Thus, higher educational institutions are increasingly using technology in teaching and learning activities. It is also faster, more participatory, more convenient, and less expensive (Wahid, 2011). Under copyright law, the work generated by the educators is protected when it comes to the content and the materials used in online learning. However, when online learning has been diversified by applying user-generated content of social media, a new way of content creation and dissemination have recently prompted concerns about whether such

actions constitute copyright infringement or not and whether it falls under copyright exceptions. This article will look at the ramifications of the present copyright laws in Malaysia as well as those in other relevant jurisdictions.

## Literature Review

The literature highlight concerns on the copyright issues when involved the internet between academicians. The reason being, once a work is created through the internet, it is not only protected in a single jurisdiction but also be published throughout the whole world. (Wahid & Mohamed, 2014). While information technology advancements allow for more flexible learning and distance education, they also increase the likelihood of copyright infringement (Wahid, 2011). Academia must adapt its content and associated activities to be used online in response to the pandemic, which necessitates the use of authoring tools (which are used in a unique manner than for research and traditional teaching materials) (Neumann & Roiderer, 2018). It is wise to be cautious in choosing information, lesson and materials from the resources to avoid any copyright infringement. When infringement occurs, the copyright owner has several options (Marsico, 2021). The sudden outbreak challenges the education system (Dhawan, 2020). It is now more vital than ever for educators to grasp the role that copyright laws play in online educational presentations as a result of the change from in-person to virtual learning options (McCarthy, 2021). Unless lawmakers enact or formalize rules that are sanctionable or formalized through educational institutions and individual instructors, problems will continue to occur in the future due to internet technologies, safe spaces, and cancel culture. These new challenges are potentially problematic on many levels (Deflem, 2021). In the United States, the Digital Millennium Copyright Act (DMCA) allows the right holder or online service provider (OSP) to issue a "takedown notice" to remove infringing content without the need for litigation (Marsico, 2021).

The literature on copyright exception on fair use shows that in limited circumstances, it serves as a protective valve within the copyright system, allowing public access to copyright works without the author's approval (Yueyue Wang, 2009). Most of the literature agrees that in spite of some international harmonization, intellectual property rights (IPRs) are territorial rights that are subject to the scope of national legislation (Neumann & Roiderer, 2018). However, although international norms and domestic legislation have encouraged flexibility in the fair use idea, this has led to a state of uncertainty and unpredictability in copyright practice. It is also worth noting that the educator's copyright does not shift to a company that controls the virtual technology used during the COVID-19 pandemic, even if that company is independently owned and operated and not affiliated with education, as is the case with Zoom, Microsoft Teams and Google Meet. In reality, these world wide web businesses are concerned with emphasizing that they are merely communication platforms and do not own content, thus avoiding potential liabilities (Deflem, 2021).

Reinforcing traditional social separation during a pandemic may require a system that secures face-to-face learning, but it comes at a cost, as this form of schooling can no longer be considered a common conversation (Murphy, 2020).

## Methodology

This paper adopts a library-based research methodology through conceptual and doctrinal legal analysis. The secondary data consists of primary sources, including the Copyright Act 1987. The primary source is triangulated with secondary sources, including academic books, journals, law reports, decided cases, online databases, official statistics and reports, and other library-based sources. Data analysis of these primary and secondary sources is conducted using thematic and content analysis.

## Result

### *Awareness of copyright law*

Creators of literary and artistic works have certain legal rights, known as copyright (or author's right). Aside from literary and dramatic works that fall under the author's right of expression, neighbouring rights are used for audiovisual works such as music or broadcasts, as well as for performers. Unlike other areas of industrial property, copyright protection is automatically granted to a work. Original literary works, musical works, artistic works, films, and sound recordings are examples of works that are protected by copyright. Literary works such as speeches, books, novels, journals, computer programmes, treatises, letters, lectures, tables, and notes are all examples of what is considered literary work. Graphic works, photographs, sculptures, and paintings are examples of artistic creations. Filmmaking is the process of preserving a sequence of visual images in the form of moving pictures. Within the context of this current purpose, musical compositions and sound recordings are particularly relevant. It is the tune that is considered musical work, and if there are any lyrics involved, the lyrics are regarded as literary work rather than musical work. However, phonograms, as defined by the Rome Convention, are "any exclusively aural fixation of sounds from a performance or of other sounds" in the case of sound recordings.

According to Laddie, the existence of copyright is justified by three principles (Laddie, 1996). To begin, he explains that no one shall steal in violation of the Eighth Commandment. Second, the concept of "the sweat of man's brow" in producing such work has the same monetary value as man's property. This is said to be the foundation of copyright law, as it discusses the concept of owning the work created by the brain. Third, there is the principle of reward, which allows authors, musicians, and the like to exploit their output to the public rather than keeping it secret to themselves, knowing that the output will profit them. The owner of a work's copyright has the exclusive right to perform certain acts in relation to the work, such as making a copy, broadcasting it, or selling copies to the public. As a result, the owner may also grant permission to another to exploit the work in exchange for payment.

Copyright related treaties such as the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the WIPO Copyright Treaty (WCT), among others, have provided for the possibility for members to establish a series of limitations and exceptions over copyright. Berne Convention, to which Malaysia is one of the signatories, stipulates that copyright shall apply to everything from the moment of its creation, and registration is not required.

### ***Awareness on Fair Use***

With the exception of private use, fair use/dealing and learning use, copyright law (which is based on international conventions and is similar in most countries) state the prohibitions to reproduce or communicate copyright material (literary, dramatic, musical, and artistic works, films, and sound recordings) without the consent of the copyright holder. In most cases, exceptions for private and educational use are subject to the payment of a statutory tax, licence fee or royalty. (Fitzgerald, 2005)

The insertion of Section 13(2A) into the Copyright Act 1987 in 2012 enabled the transition for Malaysia to a mixed fair dealing and fair usage approach from the classic fair dealing regime. (Azmi, 2021) It is necessary to understand how academics and the courts have depicted the notions of fair use and fair dealing in order to assess the potential impact of the incorporation of these concepts into the concept of fair dealing. Section 13(2)(a) and (b) of the Copyright Act 1987 allows for the balancing of four fair use factors in determining whether a specific behaviour amounts to fair dealing. The four fair factors that need to be considered to qualify for fair use and teaching exceptions, a case by case is almost mandatory, with consideration given to the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the dealing upon the potential market for or value of the copyrighted work.

However, in Malaysia, the only reported judgment on fair dealing defence is in *MediaCorp News Pte Ltd & Ors v MediaBanc (Johor Bharu) Sdn Bhd & Ors* [2010] 6 MLJ 657. The said case was held prior to the 2012 amendments, and the High Court stated that the situation in the United States of America is

different as compared to Malaysia, as there is no provision in the Malaysian Copyright Act 1987 that allows for the determination of "fair dealing" to be made by considering a wide range of factors and determining whether or not those factors are in accordance with a predetermined set of statutory guidelines. Section 13(2) (a) was then amended to read as "by way of fair dealing including for purposes of research, private study, criticism, review, and the reporting of news or current events", which gives a broader interpretation of the law. Since then, there has been no following case law that shows the significant application of the amendments.

## Discussion

Traditionally, prior to the outbreak, educators distribute materials during courses, within the allotted time period, in a classroom context. Photographs of the slides were produced, photocopied, and distributed to the pupils. Snippets of the book that are pertinent to the subjects may qualify as fair usage. Face to face lectures require two-way communication within that time frame; professors will exchange printed slides, or students single-handedly writing down all of the subject's significant notes. Some innovative educators will upscale slides with lots of animation for one purpose: to pique students' attention in the class only during the class period. Generally speaking, however, copying and distributing other people's works (for example, printing out entire articles and distributing them to the class) is riskier. As a result, when the copied material is not copied in its entirety or not distributed to the entire class, copyright law is more lenient. It is possible to make an exception for fair use in the said situation as fair dealing exceptions can be relatively narrow, mainly covering situations in a classroom or comparable settings.

Online learning is not novel for the past few years. In the pandemic, learning methods change to an "all-you-can-eat" model. As a result, in general, the globe benefits greatly since the notes, materials, slides, links are been shared over the internet. The next question we should ask is whether all the materials are actually copyright-free or falls under the exception, which allows the educator to use it without any permission from the copyright holders.

Some educators will use several platforms, including social media, to diversify the methods of teaching, for example, YouTube, Instagram and Facebook, without realizing that the content may infringe the copyright and may not fall under the exception. Youtube is a free video-sharing website where users can watch videos, like them, share them, comment on them, and even upload their own. The video service can be assessed on personal computers or all screen gadgets so long it is connected to the internet. One must be of majority age, i.e. 18 years of age or 13+ with parental consent if they want to open a YouTube account; however, for accessing the website and watching videos, users do not have to sign in or create an account. Education-wise, YouTube is one of the platforms where learning videos have been uploaded to grasp the attention of the students and to deepen student's understanding. The videos can be watched repeatedly at student's convenience time. Obviously, creative and engaging videos will be found more encouraging and exciting for the students (Kaye & Gray, 2021). The YouTube creators are required to interact with a complex copyright enforcement system that is highly automated, dynamic, and opaque when they are disseminating their works on the platform (Perel & Elkin-Koren, 2016). Since YouTube is a free video service, it is open to the public and not just for the students. Therefore it is important to be cautious in terms of inserting any images or videos in the uploaded videos. Creativity has no boundaries, but it has limitations when involved copyright. YouTube has stated out in their rules and policies that the content been uploaded in their service on their website must not infringe any copyright, and they acknowledge the fair use exception depending on the situation. They also provide tools in order for the right holder to make a request to take down the unauthorized copy of copyrighted content by manually submitting a copyright DMCA (Digital Millennium Copyright Act) complaint.

Facebook is not exactly been created as a learning platform, but it does support the interaction and engagement between educators and students. Mainly it is a social networking site that makes it easy for the user to connect and share with family, friends and even strangers online. Facebook introduced Facebook Live in April 2016, which grants everyone a camera and account to share whatever content

and whenever. Live streaming is one example of an act of communication to the public under the Copyright Act 1987. Hence, educators have to be careful while live streaming, especially if there is any background music involved, videos or images, by following Facebook's guidelines on the limitations of recorded music in live broadcasts or videos as part of their licensing agreements. It is also consistent and applied to Instagram as its featured products on Facebook.

## **Recommendations**

### ***Strategies / Measures needs to be taken***

After we've determined what we can and cannot do with third-party protected works without permission, it's time to decide what strategy or measures that's needs to be taken before uploading the content (Neumann & Roiderer, 2018)

### ***Original Work***

It is advisable to use original work for educational content. It is becoming increasingly common for students to receive their education via online and interactive means, so we must take into account the issues surrounding who owns the intellectual property rights to the materials or work in question. There will be no clear-cut solutions, and the outcome will be highly dependent on the circumstances. The most effective course of action is to ensure that everyone's rights are protected. The rights granted to the author by copyright law include economic rights and moral rights. Moral rights relate to non-transferable works of authorship, and they belong to the author. Ownership of economic rights allows authors and owners to prevent others from disseminating their work to the public, as well as to do any derivative works. Licensing or transfer of rights shall be granted to the third party for the exploitation of the work. Determining the ownership depends on the institution. There are two (2) trends in terms of determining the ownership, it is either the institution owns the academic work of its employees as in under the "work for hire" (Gadd & Weedon, 2017) doctrine, and another trend is the employees are the owners of their academic work so long it is not specifically commissioned work or funded by grants. There will be no issue with copyright infringement once you use your own original work; however, it may consume a lot of time and also have high skills in order to create innovative content on your own.

### ***Permission or Authorization***

Permission from the appropriate holder is required if you wish to use another's work. If the work is not in the public domain and is unlikely to fall within the restrictions and exceptions, an educator must obtain authorization from the work's creator or owner. While it would be ideal for incorporating additional creative works into your teaching materials within a short period of time, obtaining permission from the copyright owner can be time-consuming, and exploitation of the work entails certain costs and conditions. For instance, in Instagram's Guideline, they have a system that detects non-copyrighted content and deletes or hides the post automatically.

### ***Educating Self***

It is critical to understand the fundamentals of copyright law and become familiar with the jargon associated with it. While looking for images, film clips and music for the educational content, most people will run across terms such as "copyright free" and "royalty-free" (Marsico, 2021). Although the word free indicates something that is of no cost, both terms give different indications. Royalty-free does not mean copyright free, nor it is free to be used for the public. Its usage means that after the initial permission has been obtained between the copyright holder and the third party, which is usually accomplished through the payment of money, additional uses can be made without payment to the author. It does not imply that the work is free of charge or that there are no restrictions on its use in any way.



Once it is a copyright-free work, literally it means it is free of copyright, and it is in the public domain. In order to avoid any post-down content and to ensure a smooth sharing experience with students, the safest option is to use public domain materials, which are not subject to copyright protection. Attribution is advisable. Take into consideration the authors' moral rights; even if the work is freely usable, the author's moral rights continue to exist. Therefore, usage of public domain material for purpose offensive or sensitive issues is not allowed unless consented to. However, the term "Copyright-Free Music" or "No Copyright Music" can get misused colloquially in which they are actually not copyright free. Hence, it is important to ensure that the public domain work is actually free from any licensing terms or has surrendered the work for the public domain.

Educators can also use Creative Commons licenced content if they can't find anything in the public domain that meets their needs, provided they correctly attribute the creator's content and comply with the terms of the Creative Commons licence under which the media is offered. Creative Commons is a non-profit organization that's working to create a collaborative commons through open-source projects and free licencing schemes. Authors of creative works or content creators can use the Creative Commons licences as a standard for giving consent to others to use their work. Almost always, the content remains the property of the original creator, who retains the right to charge for additional permissions, such as commercial use of the material; however, the CC licence restricts usage to noncommercial purposes (Miszczyński, 2021). Rather than having "All Rights Reserved" as the default rule, CC encourages "Some Rights Reserved" or "No Rights Reserved" as the norm. Instead of prohibiting copying, distribution, modification, and reuse of software, CC seeks to "use copyright to authorize" it. (Dusollier, 2006) When it comes to finding content that can be used legally without infringing on the rights of others or going against the terms of fair use, the Creative Commons tools are priceless for educators. When images are licenced incorrectly, you can still get into trouble, even if you understand the differences between licences and always attribute your images to their rightful owners. As a result, educators must ensure that the images or materials they download are from a reputable source that is confidently public domain and that Creative Commons images are correctly labelled.

## Conclusion

The issue of fair use doctrine has been at the crux of the dispute over intellectual property rights. There are two sides of the coin whereby, if the exclusive rights of copyrights holders are extended beyond the scope of fair use, this could result in copyright infringement and monopoly, but in the other hand, a disproportionate number of exceptions may have a negative impact on the financial earnings of the rightsholders, thus undercutting a creative motive factor. Therefore, when it involves the education sector, it is important to create copyright awareness on measures of using third parties' works between the educators to minimize the copyright infringement and not relying in toto the fair use defence under copyright law.

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