



Webcasting in the Time of COVID-19: Copyright Implications of Remote Worship & Distance Learning

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Unauthorized public performance or display of a copyrighted work generally gives rise to [liability](#) for copyright infringement; however, current law [exempts](#) certain activities from infringement when performed in person. For example, singing a copyrighted hymn or performing a religious work during a religious service at a place of worship is [exempted](#) from infringement liability, as is the performance or display of a copyrighted work by an instructor while teaching in the classroom.

As a result of the COVID-19 [social distancing](#) policies, however, groups have begun webcasting what were previously in-person gatherings. (“[Webcasting](#)” is the practice of broadcasting an event live over the internet.) Places of worship may webcast their usual religious services. Schools and universities may webcast classes. Copyright law, however, treats transmissions like webcasting differently than in-person activities in some circumstances. Thus, certain activities generally exempt from copyright liability when performed in person may be infringing when they are transmitted or webcast over the internet. This Sidebar provides a background on copyright law before outlining possible approaches to exempting transmission of these events from copyright infringement liability.

Legal Background

A copyright gives its owner the [exclusive](#) right to take or authorize certain actions involving the underlying work. Specifically, the copyright [owner](#) has the exclusive right to, among other things, reproduce or distribute the copyrighted work, or perform or display the copyrighted work publicly. If any person violates the copyright owner’s exclusive rights (for example, by performing the copyrighted work publicly without the owner’s permission), then that person has [infringed](#) the copyright.

A person held liable for copyright infringement may be subject to a court order to stop infringing (an “[injunction](#)”) or may be required to pay [damages](#). The amount of [damages](#) may be both the copyright owner’s actual damages and any profits made by the infringer, or an amount set by statute (“statutory damages”). [Statutory damages](#) may be set between \$750 and \$30,000 “as the court considers just,” but may be increased if the infringement was willful. The prevailing party in an infringement action may also

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be able to recover its [attorney's fees](#). In certain circumstances, copyright infringement may even be a [criminal offense](#).

Congress has exempted certain actions from copyright infringement in [17 U.S.C. § 110](#) (§ 110), as well as in other provisions such as the one governing “fair use” (discussed below). In § 110, Congress created a [list of acts](#) that it explicitly defined as *not* infringing the copyright owner’s exclusive rights, notwithstanding that those actions involve using copyrighted works in a way that would ordinarily infringe. As explained below, two of those exemptions relate to in-person teaching activities and religious assemblies.

Remote Worship

A copyright owner has the exclusive right to display or [perform](#) a work publicly. Ordinarily, that right would cover the performance of a copyrighted work (for example, performance of a copyrighted hymn) during a religious service. However, Congress included an exemption as part of the Copyright Act of 1976 (“1976 Act”). Under [§ 110\(3\)](#), “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly” is not copyright infringement.

Technology has advanced since 1976, however, and in ways that the exemption’s drafters may not have foreseen. The decision of many religious institutions to webcast services to avoid contagion and comply with state and federal directives raises the question whether the § 110(3) exception applies when religious services are transmitted to online viewers. As a statutory matter, this hinges on whether a webcast performance or display could be said to occur “in the course of services at a place of [worship](#) or other religious assembly.” It could be argued, for example, that a webcast of a religious service is a “religious assembly” within the meaning of the statute.

The relevant legislative history and case law, however, does not appear to support reading § 110(3) to apply to webcast or transmitted religious services. The House of Representatives Judiciary Committee Report on the 1976 Act (“[1976 Act Report](#)”) supports the conclusion that Congress intended the exemption to be read narrowly. For example, the exemption is not [intended](#) to include secular works “even if they have an underlying religious or philosophical theme,” and would not include works performed “for social, educational, fund raising, or entertainment purposes” (although, the 1976 Act Report notes such purposes might be covered by other exemptions). Moreover, the 1976 Act Report states that the exemption [does not](#) “extend to *religious broadcasts or other transmissions to the public* at large, even where the transmissions were sent from the place of worship.” This particular statement would seem to preclude extending § 110(3) to webcasts or other transmitted religious services; indeed, one court relied on this language to determine that the exemption does not apply to [radio broadcasts](#) of religious services. Thus, § 110(3) seems unlikely to apply to works performed during webcast or other transmitted religious services.

Distance Learning

The copyright owner’s exclusive rights generally apply, absent other provisions, to the use of copyrighted material in the classroom. Again, the 1976 Act includes an exemption for certain teaching activities. Under [§ 110\(1\)](#), performance or display of a work by instructors or pupils during “face-to-face teaching activities of a nonprofit educational institution” in a classroom or similar place is not infringement. (The sole exception is when the work is a copy of a movie that the instructor knows or should have known was illegally made.) The 1976 Act Report clarifies that this exemption [applies](#) to performances or displays made “in the course of instructional activities other than educational broadcasting,” and “embrace[s] instructional performances and displays that are not ‘transmitted.’” The 1976 Act Report further clarifies

that the exemption [applies](#) to display of a work “by means of any sort of projection device or process,” but only “[a]s long as there is no transmission beyond the place where the copy is located.” Accordingly, § 110(1) would not apply to performance or display of a work that is webcast or transmitted to students.

Another exemption is specifically directed at distance learning. Passed as part of the Technology, Education, and Copyright Harmonization Act of 2001 (“TEACH Act”), [§ 110\(2\)](#) applies to transmitted performances or displays if certain conditions are met, and with certain exemptions. Specifically, the TEACH Act only [applies](#) if:

1. “the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities”;
2. “the performance or display is directly related and of material assistance to the teaching content of the transmission”;
3. the transmission is made solely for and reception is limited to “students officially enrolled in the course for which the transmission is made” or “officers or employees of governmental bodies as a part of their official duties or employment”; and
4. “the transmitting body or institution” provides materials and has in place policies that promote compliance with the copyright laws, provides notice that the materials used in the course may be protected by copyright, applies measures that prevent recipients from retaining the transmission past the end of the class session or further distributing the work, and does not attempt to interfere with the copyright owner’s protection of the work.

In contrast to § 110(1), the TEACH Act specifically applies to distance learning and might apply to certain webcasts. However, in light of the TEACH Act’s specific requirements, it would likely not apply to many webcast or transmitted educational activities occurring as a result of the COVID-19 pandemic. For example, instructors may not be able to transmit sessions with “measures that prevent recipients from retaining the transmission past the end of the class session or further distributing the work.” It may also be difficult to limit reception of a session solely to “students officially enrolled in the course for which the transmission is made.” Moreover, if the transmitting body or institution does not already have in place materials and policies that promote copyright compliance, it may be difficult for the institution to create the materials during the pandemic.

Fair Use

In addition to the specific exemptions that appear in § 110, the “fair use” of a copyrighted work, codified at [17 U.S.C. § 107](#), is not infringement. Fair use [includes](#) uses “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The statute directs that in considering whether a particular use of a copyright is fair, courts should [consider](#) four nonexclusive factors:

1. “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”;
 2. “the nature of the copyrighted work”;
 3. “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and
 4. “the effect of the use upon the potential market for or value of the copyrighted work.”
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The determination whether a particular use of a copyright is fair is often fact-intensive, and will typically depend on the specifics of how and why the copyrighted work is used. Under current law, an accused infringer **bears** the burden of establishing fair use. Thus, the success of a fair use defense to a copyright infringement lawsuit can be an **uncertain** prospect for an accused infringer. On the other hand, fair use is a highly flexible doctrine that has been extended to uses that the 1976 Act's drafters may not have anticipated, such as **mass digitization** of books for search purposes.

Given the fact-intensive nature of the fair use inquiry, it is difficult to generalize as to whether this doctrine may protect webcast religious services and educational activities. The analysis would depend on the details of the use at issue. It is also unclear how the present circumstances surrounding the COVID-19 outbreak would affect the fair use analysis, if at all. An accused infringer (for example, a teacher or professor accused of infringement for use of a work during a webcast class) might argue that the COVID-19 pandemic should be considered as part of "the purpose and character of the use" when webcasts have replaced face-to-face gatherings for public health reasons. Whether such an argument would succeed is yet to be seen.

Implications for Congress

Congress could approach the copyright issues surrounding remote worship and distance learning in a number of ways. One option would be to maintain the legal status quo. There are existing **services** that sell licensing bundles for churches to obtain permission to use certain copyrighted works. As discussed above, webcasters could rely on the existing fair use defense and specific exemptions for some uses. As a practical matter, copyright holders may be reluctant to sue educational or religious institutions for infringement, for public relations and other reasons.

Congress could also make the fair use provision easier to employ. For example, Congress could broaden or remove one or more of the factors considered when determining whether a particular use of a copyrighted work is fair. Congress could also legislate to place the burden of proof on the copyright owner, rather than on the religious or educational institution, in fair use cases.

Another option would be to amend or add to the existing protections in § 110. For example, the classroom exemption in § 110(1) and worship exemption in § 110(3) could be amended to include performance and displays transmitted over the internet, or the requirements to fall within the coverage of the distance learning exemption in § 110(2) could be changed. This would not be the first time that the § 110 exemptions have been amended to address challenges introduced by new technology.

The House of Representatives Judiciary Committee Report for the TEACH Act ("TEACH Act Report") **argued** that the prior language of § 110(2) was "inapplicable to the most advanced delivery methods for instruction." "Without an amendment to accommodate these new technologies," the TEACH Act Report **concluded**, "the policy behind the 1976 act would be increasingly diminished." Congress could use the same rationale to justify modification of the existing exemptions in § 110. Moreover, Congress could render any amendments to the § 110 exemptions temporary by, for example, having them expire on a particular date or when the current **national emergency** ends.

Author Information

Kevin T. Richards
Legislative Attorney

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