



# LEGAL ISSUES



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## Legally Speaking — Librarians, Publishers, and Educators Help out During the Coronavirus Pandemic

by **Anthony Paganelli** (Western Kentucky University) <Anthony.Paganelli@wku.edu>

As a light spring rain falls, I am currently writing this column in my home while my wife is conducting a Zoom meeting with her colleagues, and the children are doing school work on their devices. I joked with them that their new at home school is called the “School of Constant Sorrow.” Of course, I thought it was funny, but they just rolled their eyes. Now it is called, the “Paganelli Learning Academy.”

While we are practicing “social distancing” during this global pandemic, I realized that we are witnessing an historical moment. I can honestly say, I have never witnessed such mass closures and uncertainty in our communities, nor have I ever heard of “social distancing” until March 2020. We have even encouraged our children to periodically write in a journal about their experiences, so they can share them with others in the future. This time has truly been frightening to encounter and endure.

The coronavirus or COVID-19 pandemic is causing thousands of the deaths across the world, healthcare systems are stretched far beyond their capacities, it is crippling national economies, causing chaos amongst the masses, the sports and entertainment industry is taking a hiatus, and social interactions are changing rapidly. And during this time, the world is watching and praising health care workers who are battling the virus on the frontlines.



They are risking their lives and sacrificing time away from their loved ones, as well as witnessing the devastation that the virus leaves. Thousands of first responders are also placing themselves in harm’s way to help others. Several good

Samaritans are contributing to aiding those in need and others are helping the best way that they possibly can.

It was a very difficult situation. Naturally, humans want to be helpful, but when you are told that you could do more harm by reaching out and helping, it becomes frustrating and depressing when you can’t. However, we are all doing the best we can through the knowledge and experiences that each of us possess. For instance, businesses are adapting to continue to provide goods and services, manufactures are changing their production lines to produce medical equipment and supplies, and more people are thinking of other ways to contribute, such as people using their sewing machines to produce masks.

It has been good to see people coming together and helping in the best way that they can. While librarians may not be able to physically reach out to our communities due to the restrictions, we have sprung into action with our experience and wisdom. As librarians, we have many roles that have been helpful to others during the pandemic. The most notable way librarians are helping are providing resources to teachers and students. Millions of students across the world are studying at home.

In the United States, teachers worked diligently and swiftly to adjust their learning outcomes and means of instruction to meet the new “Non-Traditional Instructional” initiative. In order

to help provide these resources to their students, librarians stepped up to assist.

Numerous librarians have reached out to teachers and faculty to best assist them as they transitioned their learning resour-

ces online or as they distributed printed copies to students without computers or Internet access. Some librarians have provided information via email, telephone, video conferencing, websites, and through blogs. The **University of Florida** has even created a *Coronavirus Library Guide* that has provided information for faculty regarding copyright as they transitioned their course assignments online. This is a major way librarians are assisting teachers and students.

### Librarians’ Statement

A statement was released on March 13, 2020 by a group of academic librarians, public librarians, and library administrators that provided information regarding fair use and emergency remote teaching and research. The authors noted that copyright restrictions do not go away because of “a public health crisis.” The statement contends that the copyright law was created to help in this type of emergency based on the constitution’s goal “to promote the Progress of Science and the useful Arts,” which is through Fair Use.

Librarians were able to provide information for teachers about the relief from copyright resources, which are provided through the U.S. Code 17 § 108 Limitations on Exclusive Rights: Reproduction by Libraries and Museums and U.S. Code 17 § 107 Limitations on Exclusive Rights: Fair Use. Section 107 is the most important section for educators based on “the purpose and character of use,” which is for non-profit educational purposes.

As the authors of the statement noted, “It is evident that making materials available and accessible to students in this time of crisis will almost always be fair use. As long as we are being thoughtful in our analysis and limiting our activities to the specific needs of our patrons during this

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time of crisis, copyright law supports our uses.” The statement also included a link to resources for fair use and emergency remote teaching and research materials.

The statement concluded with information for copyright holders. The authors noted that the statement was in support of copyright laws, but the statement also mentioned the extreme situation and pressure educators endured transitioning materials and resources to their students due to the pandemic. Further information highlighted other resources for educators to seek, such as resources that were in public domain and already licensed online content.

### **Publishers Offer Relief**

As librarians offered assistance, publishers began to offer some relief for educators and book sellers. The **Association of American Publishers** released a list of education publishers that were providing support for students and educators during this pandemic. Many of the publishers issued statements and guidelines for fair use and offered benefits for librarians, educators, and students for the remainder of the spring term.

For example, **Cambridge University Press** has offered free online access to their higher educational textbooks. K-12 institutions are also receiving some relief from **Cengage’s National Geographic** learning platforms and eBooks.

**MacMillan Learning** are offering college professors that had adapted their print books to receive free access to their online learning platforms for the remainder of the term. In addition, **MacMillan Children’s Publishing Group** has created a “database of activities, educator guides, discussion guides, and other downloadable resources to make them easily accessible and shareable for booksellers, educators, librarians, and parents.” **McGraw Hill** has also provided assistance to educators and students. The list of publishers assisting is extensive.

In addition to textbook assistance, **Chronicle Books** are allowing librarians and teachers to read-aloud their titles for free. Librarians and teachers can read their books either live or pre-recorded. Other read-aloud publishers include **Disney Publishing Worldwide**, **Scholastic**, **Bloomsbury Kids**, and **Candlewick** have specific guidelines regarding how the books are read-aloud and presented.

In an effort to provide research information for Coronavirus researchers and other similar research interests, **Taylor & Francis Group** has created the “COVID-19: Novel Coronavirus Content Free to Access” site.” According to the site, “**Taylor & Francis** is committed to helping public health authorities, researchers, clinicians and the general public contain and manage the spread of the COVID-19.” The site “provides links and references to all relevant COVID-19 research articles, book chapters and information that can be freely accessed.” The company is also working with editors, peer-reviewers, and researchers to ensure the information is prioritized.

### **Museums Adapting**

The **American Alliance of Museums** has also provided information for the public and those in the museums profession with resources and information regarding the coronavirus that included educating the public on COVID-19 and preparing for closures. The museums quickly realized the need to provide and engage their audiences through digital means as the museums were being closed across the nation.

Same as libraries and publishers, the museums have begun to provide resources for the public via online platforms, such as websites and social media. The **American Alliance of Museums** provided museums four best options to engage patrons remotely, which were social media campaigns, virtual streaming, virtual tours, and through artificial reality. For instance, people can take a virtual tour of the USS Constitution through the **USS Constitution Museum’s** Facebook page, as well as a virtual tour of the **Metropolitan Art Museum**.

A wonderful social media campaign that went viral recently was the **National Cowboy & Western Heritage Museum** in Oklahoma City. The administrators gave their head of security **Tim Tiller** charge of the museum’s social media accounts. His social media posts while touring the museum during its closure went viral, mostly because he had no clue about social media, which was quickly noticeable as he wrote the word “hashtag” instead of the actual symbol. In fact his first post to Instagram stated, “I’m new to social media but excited to share what I am told is called ‘content’ on all of The Cowboy’s what I am told are ‘platforms’ including the Twitter, the Facebook, and the Instagram.” His social media posts elevated the museum to a national level

and advocated for the heritage of the region’s culture.

### **Future of Copyright in a Public Crisis**

The pandemic continues to cause thousands of deaths and is devastating national economies. People are changing the way we are interacting with each other, especially as we communicate through Zoom and other devices. While most people can’t physically help, librarians, educators, publishers, researchers, and even museum security guards are working diligently to provide resources and materials to students and our community during this pandemic.

The librarians’ statement regarding fair use during a public health crisis brings an issue to the foreground. While the statement and the code itself is reassuring that people receive sufficient resources for educational purpose during times of hardship, the situation does raise the question of how to best handle copyright issues during a public health crisis. In other words, should there be an addition or revision to the U.S. Code § 107 to provide exemptions on copyrighted materials for educational purposes during a crisis.

Fair use is an important part of U.S. copyright law and it does provide some relief for educational purposes. Yet, fair use is a difficult law to assess. **Elkin-Koren** and **Fischman-Afori** (2017) stated, “Applying the four factors of fair use involves complex analysis, which may lead to unpredictable outcomes, thus failing to offer sufficient guidance to users on whether a particular use is permissible. Some users, especially risk-averse users such as libraries or schools, may choose to avoid certain uses which are otherwise desirable and could promote copyright goals simply due to uncertainty regarding the legal consequences.”

Because fair use does not provide an exact amount of copyrighted material that can be used before it is declared infringed, there are various interpretations to the law, which hinders some people and organizations from maximizing fair use. Maybe in the future, a revision could be added to 17 § 107 that would provide a more detailed amount of fair use that could be utilized for educational purposes during a national crisis. The concept would most likely never enter legislation, but it is a thought. Of course during this crisis, it is good that publishers, authors, researchers, librarians, and educators are rising to the challenge and working within the law to provide af-

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# Is Sci-Hub Being Investigated by the FBI?

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

Last December, the *Washington Post* ran an article reporting that the **Justice Department** is investigating **Alexandra Elbakyan** and her **Sci-Hub** website for possible criminal links to Russian intelligence agencies.<sup>1</sup> A hubbub immediately arose on the Internet. Academic and library-oriented blogs breathlessly repeated the story, and publication giant **Elsevier** issued a news release commending the probe.<sup>2</sup> But is there really an “investigation”?

Numerous blogs have repeated and quoted the *Washington Post* article in the past month. Indeed, one of them (*The Geyser*) stated that “The **DOJ**’s public announcement of an investigation strongly suggests the investigators have found enough evidence to not only proceed with confidence, but to announce to the world that they’re proceeding.” In fact, there was no such announcement.

There is no press release or other statement on the U.S. Department of Justice website announcing such an investigation. Nor have I found any subsequent confirmation of such an investigation from any other newspaper. The only source cited in the *Post* article is that the information was related by “people familiar with the matter” who spoke “on the condition of anonymity.” (For her part, **Ms. Elbakyan** is quoted as calling the *Post* article “baloney.”) Let us ask whether it is *likely* that there is an investigation.

Of course, it’s possible that the **FBI** is investigating **Sci-Hub**. The company is engaged in massive copyright infringement, as the federal District Court in New York City found when it entered a \$15 million civil judgment against the website two years ago in a suit brought by **Elsevier**.<sup>3</sup> And federal law includes *criminal* sanctions to protect copyrighted works, providing that “[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain” shall be punished up to five years in prison.<sup>4</sup>

The government used this statute in 2012 to indict “Kim Dotcom” for criminal copyright infringement, as well as money laundering, racketeering, and wire fraud.<sup>5</sup> (Dotcom aka **Kim Schmitz** is the founder of the now-defunct music and video file hosting service Megaupload.) **Schmitz** resides in New Zealand and has success-

fully delayed extradition to the U.S. with court appeals, as recently as 2019.

A prosecution of **Ms. Elbakyan** and **Sci-Hub** could be even more problematic for the Department of Justice than prosecuting the elusive Dotcom. Most importantly, it may be difficult to prove the essential element of a criminal copyright case: that the infringement was done “for purposes of commercial advantage or private financial gain.” Unlike Megaupload, **Sci-Hub** is “free” and is expressly operated for altruistic purposes, e.g., to advance scientific research. **Ms. Elbakyan** is often called a modern “Robin Hood.”<sup>6</sup> So the smart bet is that the government is not seriously investigating copyright violations by **Sci-Hub**.

The *Washington Post* article highlights instead the government’s “suspicion” that she may be working with Russian intelligence to steal U.S. military secrets from defense contractors. The article does not cite any proof of this occurring but instead notes that “the scale of **Elbakyan**’s operation has led experts to conclude that she is not operating alone and must have the approval of the Russian government.”

So, is there a government investigation or not? The only evidence that there is one is from unnamed “people familiar with the matter.” Should you trust such unnamed sources? Maybe... maybe not. In order to trust the information from unnamed sources, you have to start with trusting the reporter(s) who accepted and published the information.

Here, the two *Post* reporters are experienced in covering national security stories, so presumably they’ve been around the block enough to know whether to trust their sources. The *Post* is sensitive to using unnamed sources: anonymous sources can be overused and abused. But the *Post* does have a reputation for honesty and integrity to uphold — think Pentagon Papers and Watergate — and its editors know that sources who are afraid to identify themselves have in the past provided key information that exposed grave government failings.

On the other hand, this is not a “whistleblower” situation where unnamed sources have disclosed government or corporate misconduct. It’s information

about someone perceived by Big Business (or at least Big Publishing) as an Enemy of the People. Such a report would be more trustworthy if the nameless “people familiar with the matter” were **DOJ** or **FBI** officials, but the *Post* article doesn’t say that. When the sources are in the **DOJ**, reporters usually identify them as “**Department of Justice** officials.”

The bottom line is that — for all the storm and fury from publishers about **Sci-Hub**’s massive copyright infringements — it is questionable whether there is in fact any governmental investigation of criminal conduct by **Sci-Hub**.

By the way, did you hear that the **Trump** administration has launched a criminal investigation into **Greta Thunberg**? 🐼

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## Endnotes

1. [https://www.washingtonpost.com/national-security/justice-department-investigates-sci-hub-founder-on-suspicion-of-working-for-russian-intelligence/2019/12/19/9dbc-b6e6-2277-11ea-a153-dce4b94e4249\\_story.html](https://www.washingtonpost.com/national-security/justice-department-investigates-sci-hub-founder-on-suspicion-of-working-for-russian-intelligence/2019/12/19/9dbc-b6e6-2277-11ea-a153-dce4b94e4249_story.html)
2. <https://www.elsevier.com/connect/allegations-linking-sci-hub-with-russian-intelligence>
3. *Elsevier Inc. v. Sci-Hub*, No. 15-cv-4282, 2017 WL 3868800 (S.D.N.Y. June 21, 2017).
4. 17 U.S.C. § 506(a).
5. <https://archives.fbi.gov/archives/news/pressrel/press-releases/justice-department-charges-leaders-of-megaupload-with-widespread-online-copyright-infringement>
6. *Science* correspondent **John Bohannon** sums up the creation of the controversial Sci-Hub as “an awe-inspiring act of altruism or a massive criminal enterprise, depending on whom you ask.” <https://www.sciencemag.org/news/2016/04/frustrated-science-student-behind-sci-hub>

# Questions & Answers — Copyright Column

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There's a comic that was often seen taped on the doors of my law school copyright professors way back in the mid-2000s. It featured a stick figure person sitting peacefully under a tree and looking out at a beautiful blue sky. A thought bubble appears over their head reading "sometimes, I just can't get outraged over copyright law." (You can see it here: <https://xkcd.com/14/> and tape it to your own door if you like — it's openly licensed!) That comic has been going through my head a lot as the global community has been dealing with the COVID-19 outbreak that has closed the doors of my own institution and of most non-essential services around the world. How much does copyright matter when people are in mortal danger or locked away from society for months or longer? How can we understand and respect the values of copyright in a way that also recognizes the complexity of applications in these unprecedented times?

With these issues in mind, I've selected a set

of questions about how we understand copyright and implement policy during the prolonged period of social distancing that began in my neck of the woods in early March 2020 (much later than many other nations) and is expected to continue throughout the spring and into the summer (and perhaps longer still, depending on a number of factors). While questions about balancing copyright law with other legal and human considerations may be better-answered by an ethicist or religious official, I think this moment also brings into focus the ways that copyright is flexible by design so that it can accommodate good practice even during a moment like this.

**QUESTION: An instructional librarian asks, "How does copyright apply to supporting online instruction during global pandemic?"**



**ANSWER:** In many ways, online instruction is entering uncharted waters right now since U.S. law has few models for applying modern copyright law to a

situation where neither physical access nor established licensing models can be applied to education and research. In response, many educators, researchers, and librarians have turned to fair use to fill this exigent, time-limited gap. As librarian-lawyer **April Hathcock** has noted, "fair use is made for just these kinds of contingencies." The center of gravity for many practices is articulated in a statement shared by a group of leading copyright experts working in libraries called the "Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research" and available at <https://tinyurl.com/tvnty3a>.

The statement articulates the power of fair use to support public purposes such as education and the way that power increases in moments of crisis. It walks through the four statutory fair use factors, grounding analysis in the first factor's questions about the purpose of the use as well as the importance of checking for and relying on licensed alternatives but notes that a "lack of time to check for licenses should not be a barrier to meeting the needs of our communities."

The statement offers a set of approaches to mitigate risk and suggests caution around circumvention of technical protection measures. Finally, it ends by encouraging use of already-licensed online content, openly licensed and public domain alternatives, and of working with content vendors to find mutually agreed-on ways to expand existing access to support social distancing for instruction and research.

Individual lawyer-librarians such as the **University of Minnesota's Nancy Sims**, **University of Illinois' Sara Benson**, and **Harvard's Copyright Advisor Kyle Courtney** have blogged, podcasted, and offered webinars about the way that copyright law supports public service. **Courtney** calls these copyright exceptions "library superpowers" that allow librarians to respond to this crisis in ways that support their statutorily supported role as stewards of access for the communities they serve. Individually and collectively, libraries have embraced this role and worked to scan materials even after physical buildings were closed and to build systems for interlibrary loan and scanning at

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fordable options for our teachers, students, and our communities. Stay safe!

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a distance. One example of this approach can be found in a recent webinar from the **Association of Southeastern Research Libraries (ASERL)** called “Yes You Can Scan That Textbook,” that offered copyright guidance and practical tips for libraries. It is available on their archive at: <http://www.aserl.org/archive/>.

The through line for all of these approaches is the exigency and immediacy of the crisis and the inability of libraries, educators, and scholars to rely on the traditional mechanisms built into copyright and licensing such as physical access enabled by first sale or negotiated permission. The Public Statement discussed above explicitly notes that “we also encourage campuses to begin contemplating the longer-term needs this situation presents. While fair use is absolutely appropriate to support the heightened demands presented by this emergency, if time periods extend further, campuses will need to investigate and adopt solutions tailored for the long-term.”

**QUESTION:** *An academic publisher asks, “How can publishers, libraries, and other institutions make materials they control or hold available to users during this crisis while still respecting copyright’s scope and boundaries?”*

**ANSWER:** To meet the needs of educators, scholars, and others who need access to materials they can’t physically obtain, many institutions that either hold physical resources or control copyright are looking for ways to facilitate access and use. Unsurprisingly, different stakeholders are exploring a variety of distinct approaches. A tremendous number of publishers have opened up access to some or all of their materials, many of which have been collected at sites like Vendor Love in the Time of COVID-19 (<https://tinyurl.com/vendorsupportedaccess>). Initially, this access was granted for the duration of the current spring semester, but as more and more institutions announce that social distancing will continue into the summer, the duration of this limited access may change.

While this access has been critical for research and teaching, some users have

expressed concerns about the terms of use for some of these materials, particularly where an account must be created so that personal or institutional data is harvested from each user and in cases where a “free trial” is accompanied by an automatic renewal with immediate billing at unfavorable terms. As everyone works to find the right balance of access and mission, a simple way to share is the Open COVID pledge available at <https://opencovidpledge.org/>. The pledge is a commitment to make copyright and related intellectual property openly available for a limited time. It can be implemented in a variety of ways including the suggested “Open COVID License” that makes all IP available “until one year after **WHO** declares the COVID-19 Pandemic to have ended.”

Digital libraries such as the **Hathi Trust** and **Internet Archive** have also worked to facilitate lawful access in ways that align with their individual missions. In April the **Hathi Trust** offered their **Emergency Temporary Access Service (ETAS)**, “which will allow students, faculty, and staff from eligible member

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libraries to have online reading access to materials that are currently unavailable to them in their library collections.” In their full statement, **Hathi** emphasizes that this access would be limited to libraries that were experiencing “unexpected or involuntary, temporary disruption to normal operations” and stressed that they were offering what they called a “careful and measured approach to this service, conforming to fair use under U.S. copyright law, in order to help students, teachers, and researchers continue to do their vital work.” The full statement and details about the program is available at: <https://www.hathitrust.org/covid-19-response>.

In contrast to this relatively moderate approach, the **Internet Archive** announced their **National Emergency Library (NEL)** at [Archive.org/NEL](https://archive.org/NEL) in mid-March. The **NEL** suspends the waitlist for books available from the **Internet Archive** “through June 30, 2020, or the end of the U.S. national emergency, whichever is later.” The **NEL** also offers individual authors the ability to opt out by sending an email to <[info@archive.org](mailto:info@archive.org)> with “National Emergency Library Removal Request” as the subject line.

Some libraries such as **MIT** enthusiastically endorsed this approach while many publishers and authors decried it as “outright piracy.” Dialogue around **NEL** became so heated that threats of violence and intimidation forced IA to make their list of endorsers private. Criticism often centered around the fact that **NEL** is not affiliated with a physical library and offers

unlimited access to in-copyright works, which does not follow the one-in-one-out limitations of even emerging systems like **Controlled Digital Lending** ([controlled-digitallending.org](https://controlled-digitallending.org)).

While both **Hathi’s ETAS** and the **Internet Archive’s NEL** offer digital access in a time-limited fashion as a response to an unprecedented crisis, the differing approaches reflect the culture of the respective institutions. Popular responses may also suggest the central importance of a library as a “steward of access” to a particular community and the values of librarianship more broadly.

**QUESTION:** *A school librarian asks, “Many of my teachers and fellow librarians use reading aloud as a central component of our educational work. Does copyright permit us to continue this practice digitally during this global pandemic?”*

**ANSWER:** While the earlier discussion in this column about openly-available resources and educators’ reliance on fair use offers part of an answer, this question about reading aloud provides an excellent example of these issues in practice, as well as a model for a path forward. Reading aloud is a core educational activity and many authors and publishers have explicitly stated their support for reading aloud digitally during COVID-19.

Regardless of any formal statements from a rightsholder, reading aloud is also a practice that fits comfortably within the scope of fair use when done as a transformative, noncommercial practice. Despite that fact, many school librarians have expressed uncertainty or even outright disagreement with a fair use rationale for

reading aloud online. To clarify the ways in which fair use supports this practice, a group of copyright experts and educators have developed and shared a guide to translating classroom practices and taking advantages of new technologies to improve teaching and learning, reach, and equity. (<https://tinyurl.com/read-aloud-online>)

The guide lays out the many transformative purposes of reading aloud and walks through specific practices that are likely to fit within the ambit of fair use such as “reading students in to” the virtual classroom or students reading aloud to develop and demonstrate mastery. It also offers several examples of practices that are not clearly enabled including reading a textbook aloud as a way to replace purchase of commercial course materials or running a public site unconnected to a particular course that profits from advertising revenue.

While the statement was released in the wake of the transition to online learning to facilitate health during a time of crisis, it is not presented as time-limited or even primarily as a response to COVID-19. For many students with disabilities, facing language barriers, on the wrong side of the digital divide, or otherwise marginalized in our society, it is always an emergency. In a moment of global crisis, aggressive fair use and generous licensing can save the day, but publishers, librarians, and educators can and should be working together every day to be sure that we are all meeting our mission to teach, learn, and grow as a society. 🌱