A conceptual image showing a laptop with a glowing, golden book on its screen. The book's pages are fanned out, and a large, ethereal, glowing sphere of light and sparkles emanates from the screen, filling the upper half of the frame. The background is dark, making the golden light and sparkles stand out.

# COVID19 pandemic, remote learning and online educational platforms: the challenge to copyright policy

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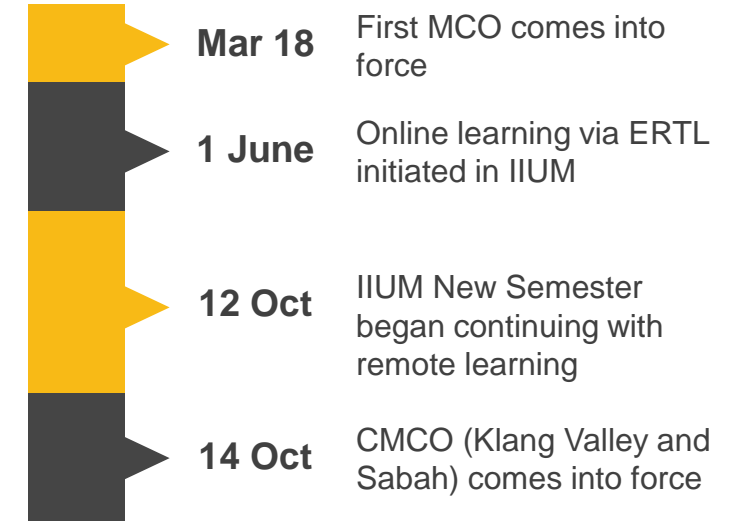


## Virtual / Distance / Remote Learning

# The rise of Remote Learning

## Remote Learning

The Movement Control Order (MCO) and social distancing measure to prevent the spread of COVID-19 has led to the need for remote learning (or *virtual learning*) in schools and other educational institutions (IPTA and IPTS). With this, physical access to learning materials has decreased greatly, and students have had to turn to digital means to supplement their education.



## Digital Means and Institutions of Higher Education

While resources for generic, pre-university education subjects are abundant on the internet, the same cannot be said for the specialist fields of study of higher education institutions which often rely heavily on books (and therefore libraries) to help with learning. As knowledge becomes more specific and harder to find online, library books become more in-need. For example, while resources on university mathematics may be common online due to mathematics being a common topic, materials on Malaysian law may be scarcer and may only be found in university libraries or non-digital books.

libraries and educational establishments are able to support the overnight switch to remote access.

Recognising that in normal times licences would simply not be needed as people could visit the library or attend the lecture in person, the European Commission should issue urgent guidance to ensure that researchers, educational establishments and libraries are able for the duration of the COVID-19 crisis to fulfil their educational responsibilities and provide remote services using in-copyright works without fear of litigation. For this, we suggest a time-limited and purposive interpretation of the Copyright Directive during the period of the pandemic in relation to the following articles:

1. **Article 5.3 (a)** – allowing the making available of in-copyright materials via closed remote networks by publicly accessible libraries and educational establishments to their affiliates, where the materials are not available electronically, or where licences or legal deposit restrictions for digital materials require people to visit the premises.
2. **Article 5.3 (b)** – the aim of this exception is to ensure that all people, regardless of whether or not they live with a disability, have equal access to copyright works. At this time where no one has access to the collections of schools and libraries a flexible interpretation of this exception to ensure all members of society have access to library collections they would normally have been able to access otherwise would be extremely valuable.

Furthermore, the European Commission and member state governments should ensure that libraries and educational establishments are enabled to support education and research and to serve their users by (1) issuing flexible time-limited guidance on the interpretation of existing limitations and exceptions in law, or other public interest defences aimed at our institutions, and / or (2) passing emergency legislation and / or (3) work with rightsholders to implement immediate licensing or soft-law initiatives to ensure that public interest activities which, in normal circumstances, could take place on the premises of libraries, schools or university campuses (and which now can only take place remotely) are deemed legal.

# Europe Must Take Urgent Copyright Law Action To Support Distance Learning & Research During the Coronavirus Pandemic

## Menu

### News

### Resources

### Events

### LIBER Annual Conference

Share this post   

April 14, 2020

**During this unprecedented global emergency, LIBER calls on European Commissioners, Member State governments, publishers and authors to urgently help libraries, universities and other educational establishments, so that they can continue supplying researchers, teachers and students with access to books, archives and other instructional materials**



April 3, 2020

Director General Francis Gurry  
World Intellectual Property Organization  
34, chemin des Colombettes CH-1211  
Geneva 20, Switzerland

Dear Dr. Gurry,

We write to you as organisations and individuals representing researchers, educators, students, and the institutions that support them, to encourage WIPO to take a clear stand in favour of ensuring that intellectual property regimes are a support, and not a hindrance, to efforts to tackle both the Coronavirus outbreak and its consequences.

The COVID-19 pandemic has shone a bright light on how important intellectual property limitations and exceptions can be to development and human flourishing. Researchers discovered the spread of the virus through a text and data mining project analyzing copyrighted news articles<sup>1</sup>, enabled by Canada's flexible fair dealing right for research purposes. The earliest potential treatments have been developed through existing medicines, enabled by experimental use exceptions to patent rights.

Now, schools, universities, libraries, archives, museums and research institutes across the world, forced to close their buildings, are transferring materials online and providing remote access, but only where copyright laws permit. However, these and other critical activities to overcome the crisis are not being performed everywhere - including where subscriptions have been paid in advance - because they are not lawful everywhere.

We have seen helpful steps from a number of countries, and from some right holders themselves, to facilitate access to academic articles and other works, educational and cultural materials, research data, chemical libraries, and needed medicines and medical devices that are subject to intellectual property rights. These steps are to be lauded. But much more is needed. And WIPO can help lead the way.

We urge you to use your position as the leader of the global intellectual property system to take urgent action to guide Member States and others in their response to intellectual property issues that the coronavirus is raising. These steps should include:

- Encouraging all WIPO member states to take advantage of flexibilities in the international system that permit uses of intellectual property-protected works for online

<sup>1</sup> See Eric Niller, An AI Epidemiologist Sent the First Warnings of the Wuhan Virus, Wired, 25.01.2020, <https://www.wired.com/story/ai-epidemiologist-wuhan-public-health-warnings/>

education, for research and experimental uses, and for vital public interests, such as access to medicine and culture;

- Calling on all right holders to remove licensing restrictions that inhibit remote education, research (including for text and data mining and artificial intelligence projects) and access to culture, including across borders, both to help address the global pandemic, and in order to minimise the disruption caused by it;
- Supporting the call by Costa Rica for the World Health Organization to create a global pool of rights in COVID-19 related technology and data, as well as promoting the use of the Medicines Patents Pool, voluntary licensing, intellectual property pledges, compulsory licensing, use of competition laws, and other measures to eliminate barriers to the competitive global manufacture, distribution and sale of potentially effective products to detect, prevent, and treat COVID-19.
- Supporting countries' rights to enact and use exceptions to trade secret and other intellectual property rights needed to facilitate greater access to manufacturing information, cell lines, confidential business information, data, software, product blueprints, manufacturing processes, and other subject matter needed to achieve universal and equitable access to COVID-19 medicines and medical technologies as soon as reasonably possible.

We believe that WIPO through your leadership can show its commitment to achieving sustainable development by taking swift and clear action to ensure that the global intellectual property system promotes research, education, access to culture, and public health.

Yours sincerely,

Organizations (listed alphabetically)

1. ABCU, Asociación Civil
2. Africa Centre for Clinical Governance Research and Patient Safety, HRI West Africa, Calabar, Nigeria
3. Aktionsbündnis Urheberrecht Bildung und Wissenschaft, Germany
4. Alianza LAC-Global por el Acceso a Medicamentos, Global
5. American Library Association, USA
6. Amical Wikimedia
7. Aprender 3C, Comunidad de Conocimiento Colaborativo
8. Asociación Chaqueña de Bibliotecarios, Argentina
9. Asociación Bibliotecarios de Córdoba (A.B.C.), Argentina
10. Asociación Civil de Bibliotecarios Jurídicos (ACBJ), Argentina
11. Asociación de Bibliotecarios de Jujuy, Jujuy, Argentina
12. Asociación de Bibliotecarios Graduados de la República Argentina (ABGRA), Argentina

# Scarcity of Access



Access is mainly *limited by copyright* and a **lack of digitization of physical resources**

- ✓ Because not all content (such as books) is digitized, not all content is licensed for digital distribution (nor do individuals even own licenses to digitally distribute content) and, consequently, such content becomes a scarce resource.
- ✓ However, often books and similar content are vital for university education.
- ✓ Because instructors have access to such resources, albeit on a limited basis, instructors will sometimes **simply reproduce the resources for their students as part of their course materials**.
- ✓ While ordinarily instructors would not necessarily reproduce such materials, the students lack of access to the library and, indeed, physical resources, necessitates the instructor's actions to support the continuance of the course.
- ✓ Such reproduction of course falls afoul of copyright laws, that is to say it is a form of copyright infringement.

## Without License

Copyright infringement is where a person without a license uses or reproduces some copyrighted work in a manner not covered under fair dealing exceptions.

## Copyright Infringement

## Exceptions

The Copyright Act 1987 provides exceptions to infringing activities including what is known as fair dealing (for a limited range of uses including **private** study and research)

# RELEVANT ISSUES

Whether remote teaching will fall within the ambit of the fair dealing provisions on education enumerated in the Copyright Act 1987?

Whether pre-recorded video modules (that contain third party copyrighted materials) which are uploaded in online platform, is treated in the same manner as face to face class room teaching

Can the university libraries claim protection under the fair dealing provisions if they upload a digital copy of the textbooks available in the physical library



## WHAT IS COPYRIGHT?

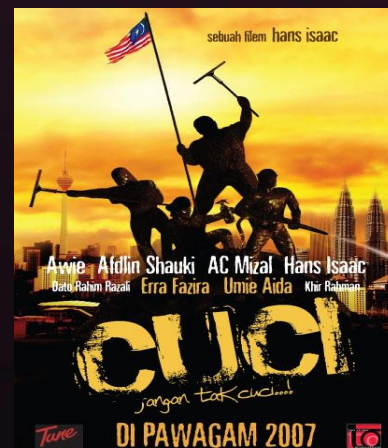
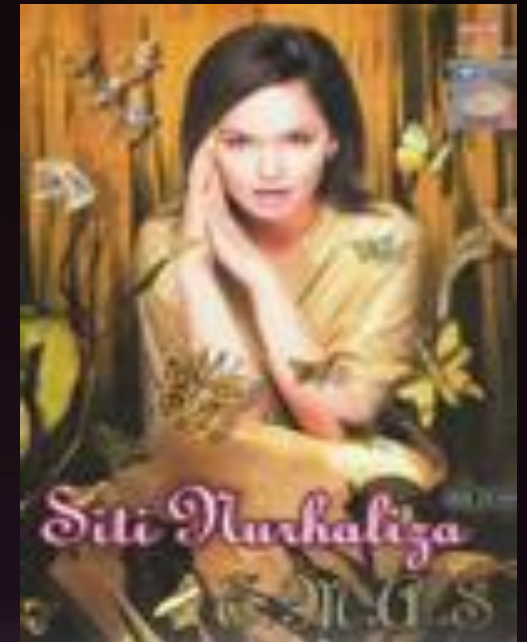
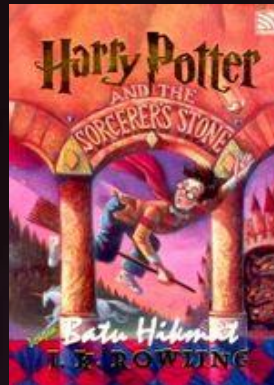
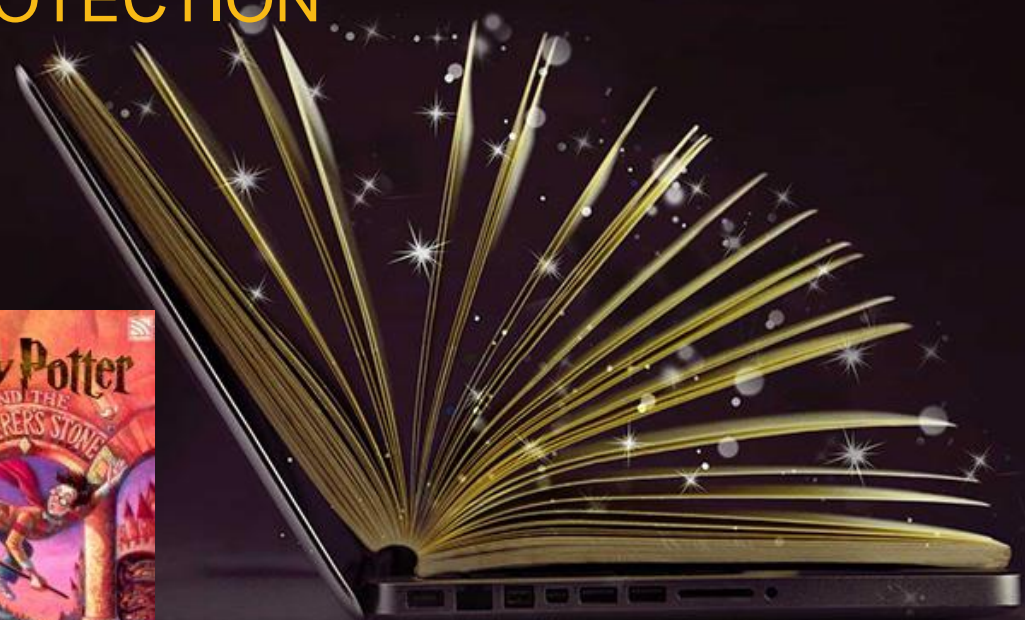
### What Is Copyright?

Copyright is the exclusive right given to the owner of a copyright for a specific period. Copyright protection in Malaysia is governed by the Copyright Act 1987. There is no system of registration for copyright in Malaysia.

A work that is eligible is protected automatically upon fulfillment of the following conditions:-

- sufficient effort has been expected to make the work original in character;
- the work has been written down, recorded or reduced to a material form;
- the author is qualified person or the work is made in Malaysia or the work is first published in Malaysia

# SUBJECT MATTERS OF PROTECTION





## Copyright Act 1987

### **S. 13) Nature of copyright in literary, musical or artistic works, films and sound recordings**

(1) Copyright in a literary, musical or artistic work, a film, or a sound recording or a derivative work shall be the exclusive right to control in Malaysia—(a) the reproduction in any material form; (aa) the communication to the public; (b) the performance, showing or playing to the public; (e) the distribution of copies to the public by sale or other transfer of ownership; and (f) the commercial rental to the public,

### **S. 36) Infringements**

(1) Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act

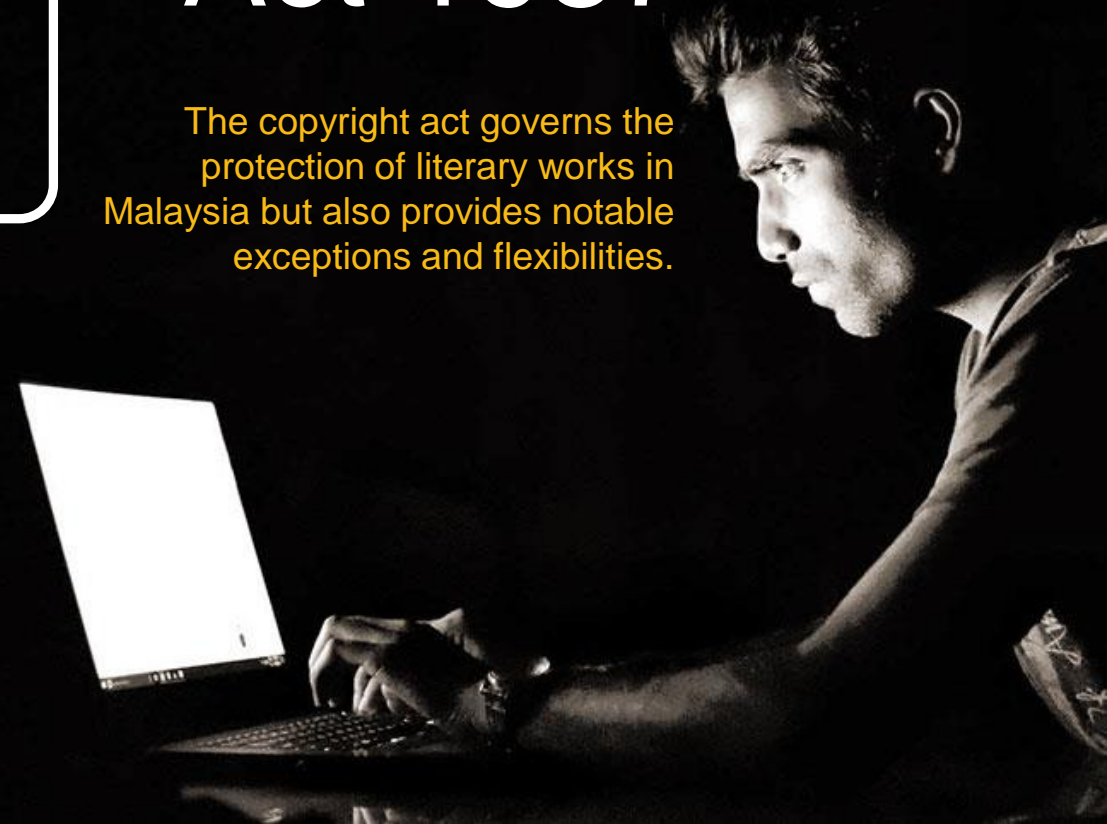
## Fair Dealing Provision

### **S.36) Infringements**

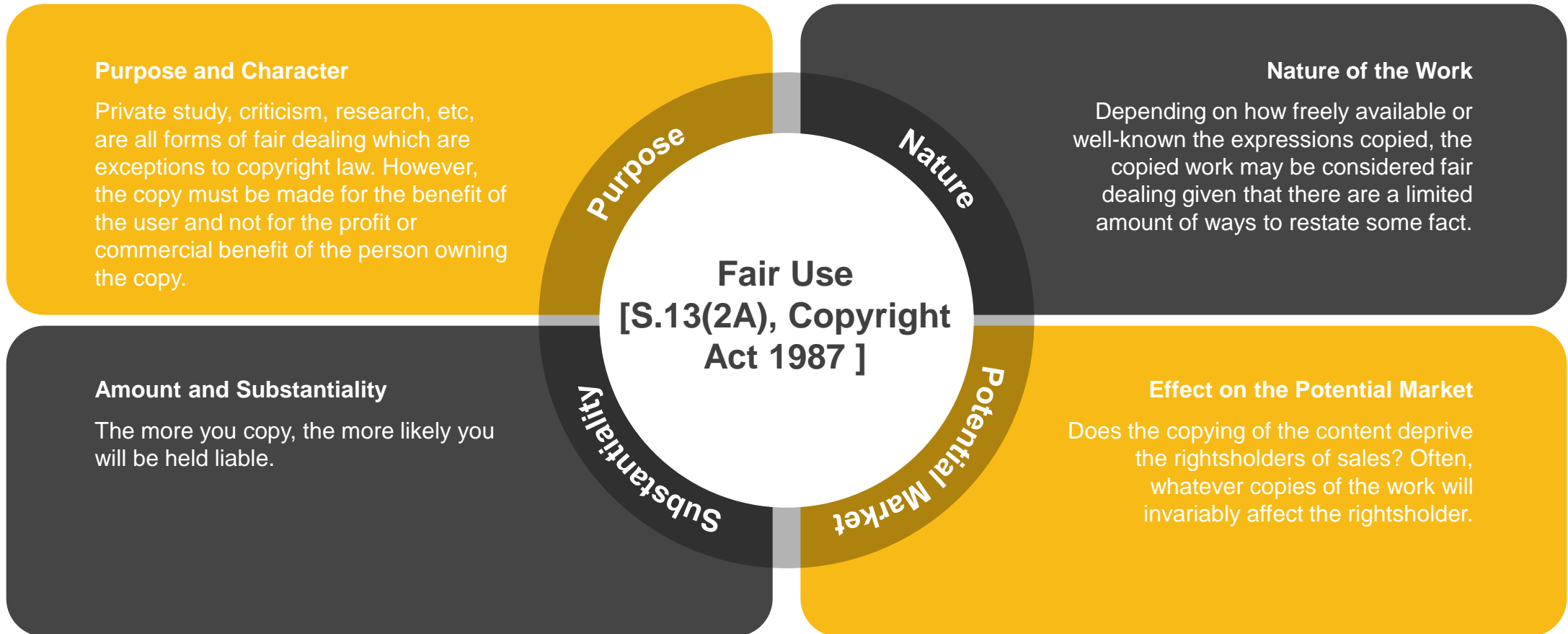
(2) Notwithstanding subsection (1), the right of control under that subsection does not include the right to control—(a) the doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events: .

# The Copyright Act 1987

The copyright act governs the protection of literary works in Malaysia but also provides notable exceptions and flexibilities.



# Fair Use Factors



## FAIR DEALING: FACTORS IN CASE LAW

Motive of reproduction. In *Associated Newspapers Group PLC v News Group Newspapers Ltd v Ors*, it was held that it was not fair dealing for a **trade rival to take copyright material and use it for his own benefit**. In *Time Warner Entertainment Co Ltd v Channel Four Television Corporation PLC*, the **acquisition of copies of a banned movie in France without the consent of the UK** copyright owner was not considered to be an unfair act.

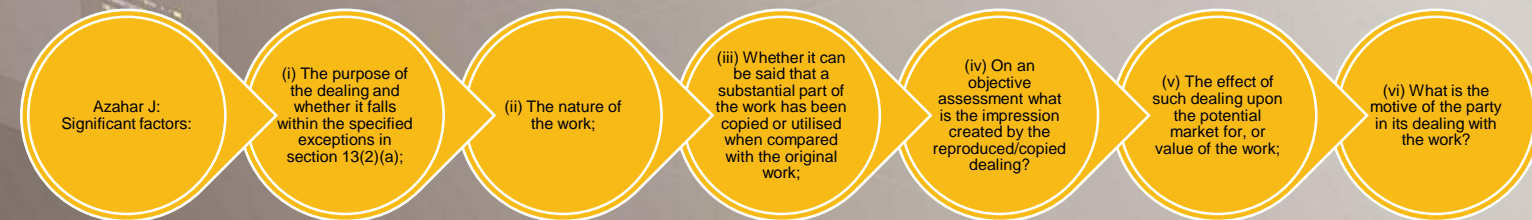
The **absence of consent**, express or implied of such circulation by the author of an unpublished literary work as to justify criticism or review. *Commonwealth of Australia v Fairfax* [1981] 55 ALJR 45.

The **quantity and quality** of the parts taken and its pertinence to the stipulated purposes in the statute. The **number of times the excerpt** was shown is also important. *BBC Corp v British Satellite Broadcasting Ltd* [1991] 3 All ER 833. Even if the part taken is substantial, but relevant for the purpose of criticism, this is allowed. *Hubbard v Vosper*.



## *Private Study: Mediacorp News Pte Ltd & Ors v. Mediabanc* [2010] 4 AMR 1; [2010] 1 LNS 296

broadcasts and TV programmes that have been reproduced as part of the media monitoring business are not falling within the fair dealing provision. As the service of compiling, editing and compressing of news items is charged for and the business is run for commercial purposes, the company involved cannot claim to have been doing it under 'private study' nor 'non profit research'.





## S 13(2)(i) Library exception

Any use of works

Limitations:

- Use in public interest
- Compatible with fair practice
- No profit is derived therefrom
- No admission fee is charged for the performance, showing or playing to the public
- Does not extend to the reprographic use of works
- Applicable to the list of libraries listed in the Regulations



# Use under the control of government – s 13(2)(i)

Ultra Dimension Sdn Bhd v Ketua Pengarah Lembaga Penggalakkan Pelancongan Malaysia [2010] 8 CLJ 245

## Reproduction of photographs in tourist brochures

the Malaysian Tourism Board qualifies as 'under the control of the government' for purposes of section 13(2)(i) of the Copyright Act 1987. The usage of the Board of certain photographs in its brochures for promoting tourism in Malaysia is thus exempted under the said provision.



# Educational purpose

(f) The inclusion of a work in a broadcast, performance, showing or playing to the public, collection of literary or musical works, sound recording or film

must be compatible with fair practice

mention of the source and the name of the author

(ff) any use of a work for the purpose of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions

(g) the recording made in schools, universities or educational institutions of a work included in a broadcast intended for such schools, universities or educational institutions

(h) The reading or recitation in public or in a broadcast by one person of any reasonable extract from a published literary work  
-must be accompanied by sufficient acknowledgement





# Transient copy, disabled community

Section 13(2)(q) the making of a transient and incidental electronic copy of a work made available on a network if the making of such a copy is required for the viewing, listening or utilization of the said work

Section 13(2) (gggg) The making and issuing of copies of any work into a format to cater for the special needs of people who are visually or hearing impaired and the issuing of such copies to the public by non-profit making bodies or institutions and on such terms as the Minister may determine

...

...



# Any use for judicial proceedings s13(2)(I)



Xin Xin Engineering Sdn Bhd & Anor v  
Fukuyama Automation Sdn Bhd & Ors,  
[2016] 9 MLJ 217

it was judicially observed by the Court that in order to claim a certain reproduction to be lawful, three criteria must be fulfilled:

- (a) it is for a lawful purpose
- (b) the source and author of the work must be mentioned; and
- (c) there is consent from the copyright owner.

In this case, certain operation manual was photocopied for the purpose of judicial proceedings. The defendant argued that such use is lawful but the Court noted otherwise as the defendant had, in the course of copying, cancelled the name of the plaintiff as the author of the manual. This act amount to copyright infringement.

.....

.....

# Limited Reproduction of Content

Can a few pages from books be photocopied or scanned?

## Online Distribution of Photocopied Books

Because of the limited physical access to books, scanning books and sending them to users who request them may seem like a feasible alternative. Of course, scanning an entire book would fall squarely afoul of copyright restrictions; however, there is an argument to be made that limited photocopying of, for example, single pages may be allowed so long as the copy is made for a user seeking to make use of it for private study or research.

However, no official legal guidelines exist as to the amount of pages which can be scanned before 'fair dealing' comes into play. Copyright law makes reference to the "De Minimis" principle in which insubstantial amounts of copying may be safe for reproduction. However, use of the principle treads a very fine line.



Downloading and uploading files

Scanning from physical documents

Small is beautiful- fair amount of copyright work for teaching illustration is allowed, large amount requires permission

Proper acknowledgement- amount limited only to illustrate the point

Image – would be difficult – it's the hole thing

Look before you leap onto Youtube



Digitize only the necessary parts, not entire book

Make content available only for class in the designated online platform; not on open digital repository

Do not circulate copies of the digitized materials, keep them on an intranet, not the open Internet and make them accessible (but not downloadable) in an online platform instead of emailing copies to the students

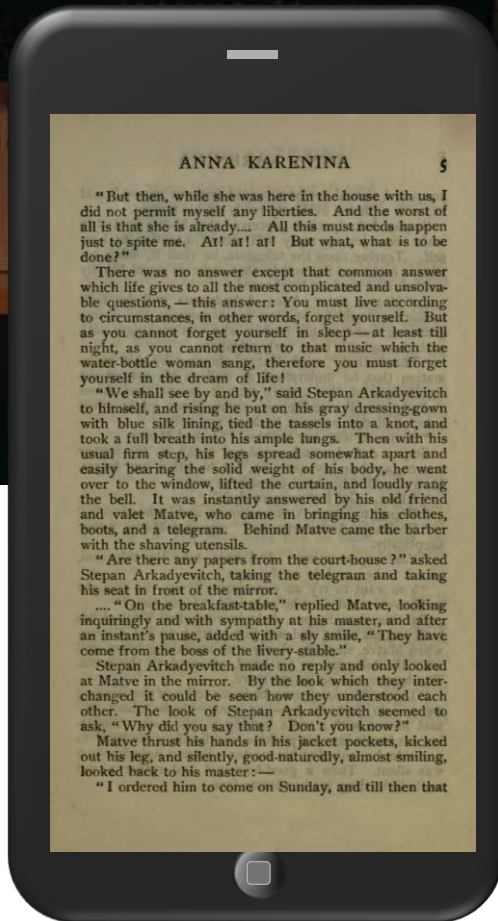
Limit recording of live streamed lectures and treat any necessary recordings consistent with these recommendations

When the exigent circumstances are over and face to face instruction resumes, stop using the digitized works or obtain proper licences for them



# Solutions and Issues: E-Book Lending

During this time of pandemic and the inability to physically access libraries, e-book lending has become a more popular alternative to traditional library lending. However, in order to be in conformity with copyright law, e-book lending must conform to the same rules as traditional lending. While Malaysia does not have any specific guidelines on eBook lending, Perpustakaan Nasional Malaysia does offer an eBook lending service which relies on an international service provider, and some similar practices may be followed from that.



Need to renegotiate the licence; waive limits to campus only access, waive limits the no of simultaneous users, waive restriction on document delivery and photocopying limits

## The Book must be Licensed



Permission must be granted from the rightsholder before eBooks may actually be lent in this way.

## No Concurrent Lending



The eBook often has to be treated as a physical book in terms of its limitations. This means that even though a physical copy exists, if lent digitally, the physical copy itself cannot be lent out.

## One book, one user



The purchase of one physical copy of the book or one license of the book only entitles one user to that copy, similar to traditional lending. To lend more copies, more copies must be purchased or licensed.

## Follow the License



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# US - Technology, Education and Copyright Harmonization Act ("TEACH Act"), 17 U.S.C. § 110

§ 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.





# A Word of Caution:

## The Internet Archive Case

### The Lawsuit against the Internet Archive by Major Publishers

The Internet Archive is a free digital library providing access to digitized books in pdf, html, ebook and other formats. The site allows for the free upload and download of digital content for the purpose of a historical archive and the free access of information. In respect of digitized books, the Internet Archive ordinarily operated as a standard digital library, allowing users to borrow books in its possession and limiting the number of books that could be digitally lent out and putting people on a waiting list for books if they weren't available.

However, at the onset of the COVID-19 Pandemic, the Internet Archive launched the National Emergency Library, doing away with the waiting list and allowing immediate access to books. This action prompted a suit by publishers such as Penguin, Wiley, HarperCollins, which accused the Internet Archive of facilitating piracy.

While the case is underway, the flaunting of copyright laws, even in the face of pandemic, should not be a matter that is taken lightly.





# Moving Forward

## Digitization of Resources

To conform with copyright law, and in the face of the increasing need of remote learning resources, digitization of physical resources, or even the acquisition of digital distribution licenses is key.

## Public Domain Lending

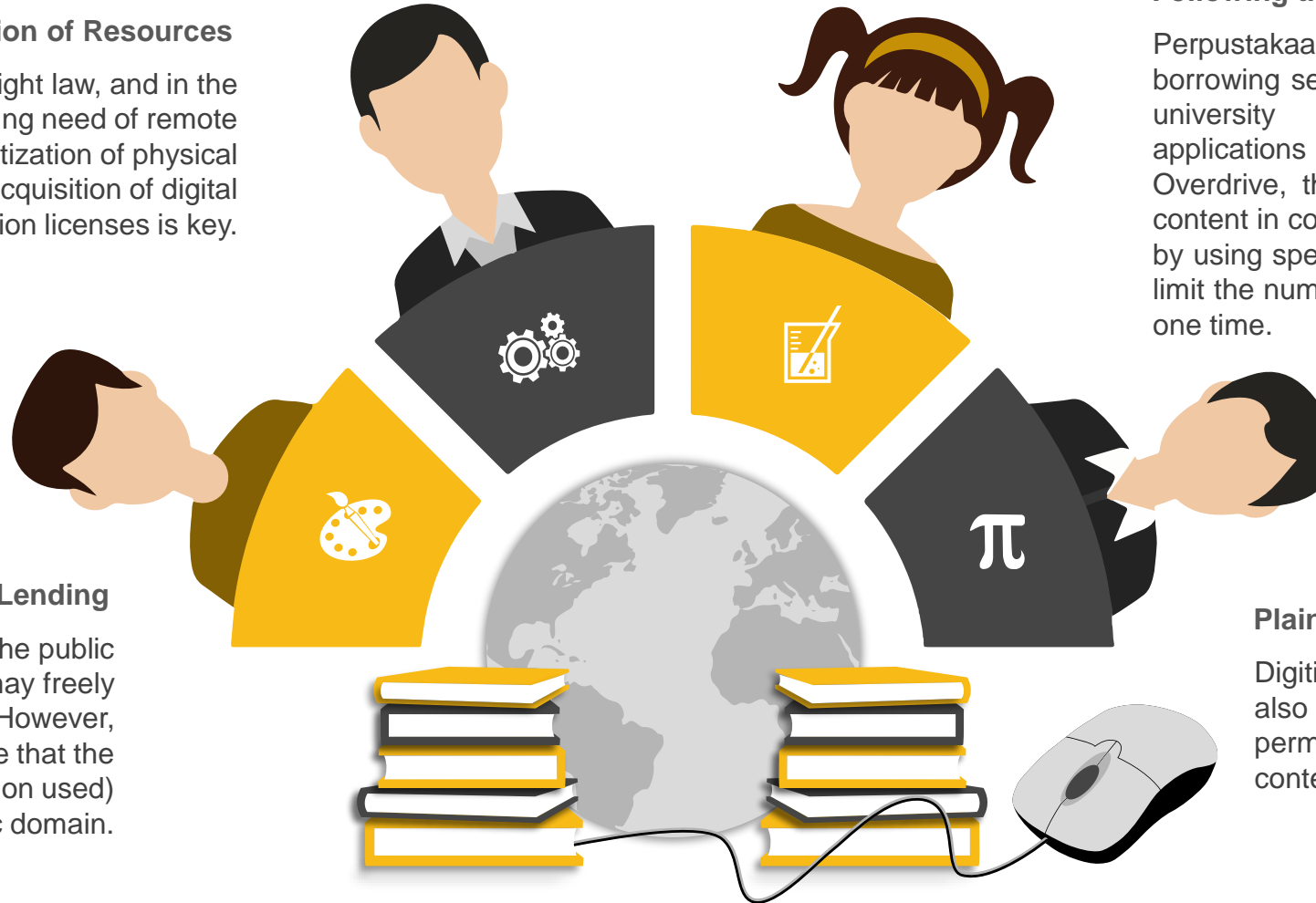
Some books may already be in the public domain, and libraries may freely distribute these books to users. However, care must be taken to ensure that the version of the book (or translation used) has in fact lapsed into the public domain.

## Following the National Library

Perpustakaan Nasional Malaysia provides ebook borrowing services which could be a model that university libraries could follow. Using applications such as Libby or services such as Overdrive, the library is able to digitally serve content in conformity with existing copyright laws by using special licenses and applications which limit the number of books the library may lend at one time.

## Plain and Simple Licensing

Digitization of physical content should also be done with a view to getting the permissions of the rightsholders of the content.



# QUERIES

If copyright duration of a work has expired, the work will be in the public domain, in Malaysian context, what is public domain, are they everywhere?

- Fair use vs. fair dealing, are they different?
- In which situation one needs to ask permission from the author/creator. Like in research, no need to ask the author's consent, enough to properly cite the works (from what I understand - correct me if I'm wrong)
- If a work is a product like an app, is it better to file under copyright or patent, or both is possible?
- Can a copyrighted item be commercialized or only a product under patent can do so?
- What are the rights of the owner and author of a work?
- Upon copyright infringement, what are the procedures involved to lodge a report?
- During this COVID-19 outbreak, what privileges a library can expect from the fair use/dealing provision of the Copyright Act since online services and resources are becoming a contemporary trend in education.



