

***Racy Memes in Class: Content Rules and Copyright Compliance***

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Authors: [Mary Hernández](#); [Conor Kennedy](#)

During the pandemic, California has required public school instruction to take place remotely. Many school districts have turned to online platforms that are not fully tailored to daily classroom use. The platforms, including Zoom and Google, give users powerful customizable options. That's a feature for most end users. But for school districts, it can be a bug.

Many of the platforms in use by schools allow students to upload almost any image available online and broadcast it through a profile icon or a background image to other students and onlooking family members *during class time*. Students can upload something that is impossible to ignore. After all, watching the screen is mandatory for classmates. It's required by attendance rules and essential for learning that all students log in, view the channel, and focus and interact with all visual elements on the screen. This, in essence, turns everyone into a captive audience for everyone else's student expression. Some students have already started to abuse this affordance by choosing racy and provocative images as profile icons and virtual backgrounds, in part to get a rise out of everyone else viewing the stream.

Of course, schools already know they can regulate student speech that is substantially disruptive to classroom learning, and existing policies permit a school to crack down in specific cases of cyberbullying, harassment, and/or discrimination. Beyond these tools, though, school administrators and their district boards still need to know where the line will be drawn by the courts. Our schools need an answer: when does the law permit a teacher to proactively tell students: "no memes during class time," full stop?

*Is the Online Learning Environment School-Sponsored Speech?*

With online learning, student expression takes place in an official, school-controlled online channel. Customized student backgrounds and icons in essence *promote* the student expression that makes its way into the channel, which means that left unchecked, the school channel will promote student speech that could be inconsistent with the District's mission and goals.

In light of this inevitability, school districts have begun to consider whether and how to regulate student expressive content during class time. Can a school require that students display the school logo or a class picture, or does that run afoul of a student's First Amendment rights? What if a teacher requires everyone to choose from a series of pre-

approved background images? If the courts decide some forms of student expression during remote class time are akin to “school sponsored speech,” districts will have leeway under the First Amendment to adopt proactive, across-the-board content regulations. If not, though, student expression will become more difficult for districts to regulate with clear, simple rules. *See C.R. v. Eugene School District 4J*, 835 F.3d 1142, 1148-9 (9th Cir 2016) (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). Instead, schools will be forced to discern, case-by-case, meme-by-meme, whether a specific image on a student’s profile is reasonably likely to substantially disrupt class time.

When analyzing this issue, courts are going to be hard pressed to ignore the ways in which student content expressed through an online platform resembles prior established examples of “school-sponsored” speech. In the online learning environment, student expression occurs under school auspices. District employees control the class time sessions. The interactive component of the session imparts particular skills and knowledge. The broadcast can reasonably be perceived by parents to bear the imprimatur of the school. Notably, the Supreme Court has taken precisely these kinds of considerations into account when deciding what constitutes “school sponsored speech.” Consequently, the unique aspects of online learning discussed here increase the likelihood that school districts will ultimately enjoy broad deference to enforce clear, prospective rules. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

### *How Does Copyright Law Apply to Student-Uploaded Content in the Online Learning Environment?*

An additional but no less important consideration for school districts developing policies in this context is copyright compliance. Widespread student expressive content online tends to incorporate unlicensed, third party images. As an unintended result, students who display images are often unknowingly violating federal law. Doing so through official school channels can extend the violation to the school itself, in particular if a teacher records a class for later use. Each new copy creates more risk.

For schools in California, the looming threat of an exorbitant copyright demand has become all too commonplace. “Rightsholder” outfits have taken to targeting our state’s school districts with aggressive demand letters and even lawsuits based on the alleged use of unlicensed content. Many level extortionate threats and seek to extract considerable sums from district general funds. Racy or not, that means student expressive content could more properly be addressed as a matter of copyright compliance,



potentially requiring a district to take precautions that prevent unauthorized images from appearing in official school channels.

*How Should Districts Proceed?*

As districts prepare policies and protocols to set clear expectations in the new online learning environment, boards should be sure they are taking full advantage of the flexibility schools are afforded under the law to prioritize student learning. Our firm has assisted a number of client districts in establishing reasonable rules that are flexible, compliant, and minimize exposure to liability, based on each district's unique needs. If you need assistance in developing or updating your school district's policies and protocols pertaining to online learning, please contact the GHS LLP lawyer with whom you usually work, or contact the author of this Client Note, Conor Kennedy at (510) 695-2802 or [ckennedy@ghslaw.com](mailto:ckennedy@ghslaw.com).