

The Electronic Jungle:

The Application of Intellectual
Property Law to Distance Education



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INTERNET

There is, I think, no point in the philosophy of progressive education which is sounder than its emphasis upon the importance of the participation of the learner in the formation of the purposes which direct his activities in the learning process¹

—John Dewey

O this learning, what a thing it is!²

—William Shakespeare

I. Introduction

As an industry sector, educational institutions are ambivalent towards intellectual property, serving as an incubator for new work, a significant repository of intellectual property ownership and as a primary consumer of other parties' intellectual property. Universities are increasingly participating in the expansion of intellectual property development by sharing in revenues derived from patents developed on campus or creating for-profit subsidiaries to exploit the value in the materials created.³ At the same time, schools and colleges are pushing for greater legal protection to freely exploit copyrighted works and other intellectual property.⁴

As a starting point, it should be noted that all course materials are intellectual property, including the copyrighted books and materials used by the students;⁵ the trademarks associated with the school or institution;⁶ and the notes or lecture materials of faculty members as written or scribed by students.⁷ Distance education tools only add to this mix by providing copyrighted software to deliver course content;⁸ copyrighted software and Internet sites providing content and services;⁹ trademarked institutional brands promoting the quality of education and validity of the content on each school's website;¹⁰ copyrighted video or audio broadcasts of the course sessions in both real time and on-demand; copyrighted course content created by the students; copyrighted and trademarked materials distributed in the class by students; copyrighted archived material; links to third party, copyrighted and trademarked materials; and publicity rights for the identities of persons featured in published advertising.

The dual nature of schools—as both creators and consumers of intellectual property—must be taken

into account when creating policies for the creation, adoption and use of intellectual property in the developing, distance education marketplace. The purpose of this Article is to set forth the intellectual property law issues that academic institutions need to consider when establishing policies for distance education programs. Both the law and business practices in this field are in great flux; therefore, the statements included herein are only accurate as of its date of initial publication. This Article should provide only an introduction to the legal topics that arise in the distance education context. Any individual using the materials and information presented must always research original sources of authority and update the information to ensure accuracy when dealing with a specific client or firm matter.

II. Overview of the Distance Education Marketplace.

A. Economics

The growth of distance education continues to expand at a pace unthinkable even four years ago. Conservative estimates suggest that at least 75 percent of two-year and four-year colleges have begun to provide at least a smattering of courses online¹¹ and many opportunities exist to earn a bachelor's degree, master's degree, Ph.D. or even a J.D. online—often at regionally or professionally accredited institutions. Although the market for distance learning in education is unknown, the projections are compelling. For example, Merrill Lynch projects the U.S. online market in higher education will surge to \$7 billion, from \$1.2 billion, by 2003.¹² Other examples abound:

According to technology research firm IDC, online schooling accounts for about \$2.2 billion of the \$19.5 billion spent on corporate education and training this year (that excludes training that companies deliver in-house to their own employees). IDC estimates that by 2003, e-learning or Web-based training will account for \$11.4 billion of the nearly \$30 billion business education market. And in a recent survey of 40 of the world's largest corporations, Forrester Research found that all but one had online training initiatives already in place.¹³

Much of the growth in the distance learning market will come from corporate training.¹⁴ University-based education will undoubtedly be more successful for attracting students in those fields where employers currently provide funds for continuing education.¹⁵ Further, unlike the early days of distance education when the unlimited potential of distance education was one of the many overly hyped fields on the Internet, today, traditional colleges are successfully expanding their base using distance education courses, even as most for-profit entities have struggled or gone bankrupt.¹⁶

In addition, it should be noted that for the traditional college or university there may be little or no financial savings in the delivery of class content via the Internet, except the inherent cost of capital expenditures for classroom space, although that may be significant at some institutions.¹⁷ The primary corporate savings are in scale—the ability to have the same materials viewed by hundreds of students instead of dozens—and efficiency, because the class can often be held at the student’s office or work desk, rather than at an offsite location. For more complex educational objectives, involving a significant amount of student-teacher interaction, schools tend to cap the class size well below the level allowed during live classroom experiences, further eroding any potential financial windfall.¹⁸

Further, although there has been strong interest in this arena from for-profit companies eager to become involved in this multi-billion dollar industry, no companies are currently successful in this arena as for-profit ventures.¹⁹ Ultimately, some businesses will be successful financially, just as University of Phoenix and others have been successful in for-profit education generally. Nonetheless, it will not amount to the sort of windfall anticipated at its inception.²⁰

Part of the failure to succeed financially may stem from a lack of marketing strength and the need to market against a deeply embedded competitor in the nonprofit, academic community. Among vendors, very little emphasis has been placed on marketing to the general public. E-College and Peterson’s have been commonly cited as the two sites most readily used to

find courses online.²¹ As of yet, no portal for online education presently exists that does much to serve the distance learning community. In contrast with the original, targeted course design and content offered by University of Phoenix, class aggregator websites such as that offered by Western Governors University tend to list everything, overwhelming the interested applicant with too many, undifferentiated choices.

On the other hand, the lack of success at Fathom has been attributed to its expensive, long courses.²²

Perhaps the real distinction can be found in the two areas of strength—corporate

training and community colleges.²³ These two learning environments have much in common, particularly the identification of clear goals and immediately applicable skills. For students engaged in training or education that has immediate and concrete application, motivation and retention increase substantially.²⁴ Abstract course content provided by the British Museum may be interesting, but Fathom has found no market for such content.²⁵ In contrast, the University of Phoenix has an estimated 27,000 online enrollees for its highly focused, practical classes.²⁶

tension between academic institutions as creators and consumers of intellectual property seems to be most directly felt in the new areas of distance education.

B. Distance Learning Tools and Strategies

The intersection between distance education and intellectual property requires that each be identified and defined as a prerequisite to analyzing their interaction. Distance learning, in particular, can mean almost anything.²⁷ As the Register of Copyrights reported, “There is no ‘typical’ digital distance education course.”²⁸ It encompasses everything from traditional correspondence courses (where materials are mailed to the student who completes the reading and returns an examination or paper for evaluation) to a classroom of students who happen to meet at a location somewhere off the university’s primary facility while being taught interactively by a faculty member located back at the university.²⁹

The Register of Copyrights has adopted a broad definition of distance education, categorizing “distance education [as] a form of education in which students are separated from their instructors by time and/or space.”³⁰

The Register of Copyrights focused its study on “the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials.”³¹ The distinguishing characteristic of distance learning or education is mediated instruction by a faculty member, who serves to shape the learning process. This is distinct from a resource center of materials that can be used by the student without supervision or direction.³² While this latter category of educational services may also serve many educational needs, the primary focus of the law and regulation remains on mediated activities.

Increasingly, the Internet has become the medium of choice because of its low delivery costs and simultaneous (and asynchronous) communication capabilities.³³ Distance learning on the Internet is comprised of a number of features.³⁴ A partial list of those features includes the following:

1. E-mail (which a person can use to send a message (or software files) to one or more recipients);
2. Online “library” (collected materials and resources available from the website);
3. Links (connection to other websites or electronic resources provided by third parties);
4. Bulletin boards (asynchronous message boards for participants to post comments as well as share computer files (which may include documents, sound recordings, graphics or software));
5. Chat rooms (synchronous or live text-based communications among the participants);
6. Listservs (group e-mail in which every participant can both send and receive messages and files by communicating with a single, central address);
7. Streaming audio and video (live audio or audio-visual broadcast from the lecturer to the participants);
8. Desktop video conferencing (live two-way video and audio conferencing);
9. Automated examination and evaluation software); and
10. Search engines that gather information available on the Internet.³⁵

These tools allow the school or instructor to design

a course meeting appropriate instructional design goals for the topic of the course.³⁶ Nonetheless, the underlying goals are—or should be—determined by pedagogical or educational objectives.³⁷ “Instructional design is critical to distance education and planning for effective teaching is needed for learning to occur.”³⁸ Notwithstanding the improvements in technology, this is the daunting task. As one analyst of the technology commented, “[c]ontent creation remains a labor intensive task which requires specialized knowledge of Instructional Design principles.”³⁹

C. Distance Learning Services

Distance education may be used alone or in combination with a classroom environment. In its simplest form, students can exchange e-mail to collaborate on homework or out-of-class projects. At the other extreme, a degree may be offered entirely online,⁴⁰ allowing students living throughout the world to attend asynchronously by meeting the objectives of each instructional module. The appropriateness of these tools depends on the objectives of the course and instructor.⁴¹ In undergraduate education, for example, the goals are often focused on socialization, collaboration and community building skills, which are taught through the learning of a (sometimes unrelated) subject matter.⁴² For advanced professional education or job-skills training, the interpersonal development occurs at the workplace rather than the classroom, so these objectives are not included in the process.⁴³

The key to effective distance education is to identify the objectives explicitly and select tools that support those skills, rather than to choose tools or the medium first. As then Secretary of Education Richard Riley commented, “[t]his debate has never been about technology. It has been about what our children have the opportunity to do. It’s about connecting students to a whole new world of learning resources and offering the mind the opportunities to expand and take on a new and challenging future.”⁴⁴ Many of the strategic problems associated with distance learning tools are the poor fit between the pedagogical goals and the tools selected.⁴⁵

III. Legal Issues Involving Distance Education Tools and Services

A. Copyright Background

Copyright provides the author of an original work the sole

power to sell or transfer the rights to the work. Subject to certain limitations, such as fair use, the copyright holder retains a monopoly over the work. The subject matter of copyright is the expression of ideas, rather than the ideas themselves.⁴⁶ Copyright protection subsists in original works of authorship fixed in any tangible medium of expression.⁴⁷ Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.⁴⁸

Copyright protects only the expression of the work—the writing style and detailed plot of the story, but not ideas, procedures, processes or facts.⁴⁹ Copyright protects the creativity of the expression, but does not give any author a monopoly on the facts or ideas presented. No copyright in course materials, therefore, can preclude another faculty member from creating her own materials to teach the same subject matter.

The exclusive rights of the copyright holder are categorized into seven distinct rights. Generally, these rights provide the copyright owner with exclusive power of (1) reproduction or copying; (2) adaptation or the creation of derivative works; (3) distribution by sale or other transfer of ownership, or by rental, lease or lending; (4) public performance of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works; and (5) public display. In addition, two categories of protection are specific to certain works. In the case of sound recordings, the copyright owner (typically a record label) has the right to perform the copyrighted work publicly by means of a digital audio transmission.⁵⁰ In the case of a work of visual art (made in a series of fewer than 200 copies), the creator receives the additional rights to receive credit for creating the work and to ensure that the work is not mutilated or destroyed by the owners of each copy of the work.⁵¹

B. Copyright Mechanics

For works created after January 1, 1978, the term of copyright lasts for the life of the author, plus 70 years.⁵² If the work is made as a work for hire, then

the term is 95 years from publication or 120 years from creation, whichever is less.⁵³ This is also the term provided for anonymous and pseudonymous works.⁵⁴

For works created prior to January 1, 1978, the copyright term is more difficult to calculate. United States works published prior to January 1, 1923⁵⁵ are in the public domain, and thus receive no copyright protection.⁵⁶ Works published between January 1, 1964 and December 31, 1977 have a copyright term of 95 years.⁵⁷ Works published between January 1, 1923 and December 31, 1963 had an original copyright term of 28 years which could be extended by an additional 67 years if the copyright owner renewed the copyright.⁵⁸ Because many works were not renewed, the copyright in those works lapsed and the materials are now in the public domain. For works published during this period, however, no assumption can be made that a given work is in the public domain, so each work must be researched to determine its copyright status.⁵⁹

In addition to the requirements that works published prior to January 1, 1963 be properly renewed, there are other rules that continue to apply from former law. The most important of these is the statutory formalities of copyright. There are three steps for formally protecting a published work. Under current law, however, none of these serves as a condition of receiving copyright, and the importance of the formalities has lessened considerably during the past twenty years. The first requirement is notice, which includes the copyright symbol “©” (or the word or abbreviation for copyright) along with the year of publication and the name of the copyright holder.⁶⁰ This should be featured prominently in a place a viewer would expect to look (e.g., the title page of a book).⁶¹

The second formality is registration, which requires that a filing fee (presently \$30.00), the appropriate form and a copy of the work be submitted to the Copyright Office.⁶² While this is no longer required, it does provide some benefits if a legal dispute ever arises regarding the work, including *prima facie* evidence of the facts in the copyright application⁶³ and statutory damages and attorneys fees if the suit is filed in a timely fashion.⁶⁴

Although the registration of current works is no longer mandatory, this has only been the case since February 28, 1989 when the Copyright Act was amended to provide for adherence by the United States to the Berne Convention. For works published between January 1,

1923 and February 28, 1989, the work must have been properly registered within three months of its publication to receive copyright protection.⁶⁵ “[T]he statutory rules regarding copyright notice that were in effect at the time of the first publication of a work determine the copyright status of that work; failure to comply with those rules thrust the work in the public domain.”⁶⁶

The third and final formality remains mandatory even under the present statute. The Library of Congress is entitled under the Copyright Act to receive two copies of the best edition of every published work made in the United States.⁶⁷ This deposit is generally made as part of the registration process. In the situation where a copyright holder of a published work elects not to register the work, the copyright owner is still obligated to submit copies to the Library of Congress.⁶⁸ If the copyright owner refuses to send copies after receiving a demand letter, then the copyright office can levy substantial fines.⁶⁹

C. Ownership and Transfer of Course Materials and Websites

As a general rule, copyright vests in the author of a work at the time it is fixed in a tangible medium of expression.⁷⁰ One significant exception to that rule is the “work-for-hire” doctrine, under which works in two categories are owned by the employer or the party that contracted for the work to be created.

In the situation where a work is specially ordered or commissioned, the copyright may vest in the party commissioning the work, rather than the party who authored it.⁷¹ In such a situation, an independent contractor or other non-employee may assign the authorship in a work so long as two conditions are met.⁷² First, there must be a signed agreement among the parties that provides that the work is to be considered a work made for hire. No oral understanding or course of conduct between the parties will be sufficient.⁷³ It must be in writing. Second, the work must fall into one of nine categories set forth in the statute: (1) a contribution to a collective work; (2) a motion picture or other audiovisual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; and (9) an atlas.⁷⁴ Any instructor, therefore, can assign the authorship of his or her instructional texts or audiovisual works (this will generally include websites and other content used for online distance

education) to the school by signing an agreement which includes the appropriate transfer language.⁷⁵

As a separate basis for transferring authorship to the school as the employer, copyright law provides that works prepared by an employee within the scope of his or her employment are the copyrighted work of the employer rather than the employee.⁷⁶ To meet this test, there are also two criteria. At the outset, the person must be an employee, which typically means paid a salary, with proper tax withholding and employment benefits.⁷⁷ For more difficult cases, there are a list of factors that have been identified by the Supreme Court.⁷⁸ This list of factors takes on significance primarily for adjuncts and part-time faculty, who may be treated as independent contractors for purposes of employment benefits and federal tax treatment. When the faculty member is an independent contractor, the significance of the right to control becomes increasingly important in determining copyright ownership.⁷⁹ This determination is highly fact-specific and subjective. As a result, reliance on the employer-employee relationship will create significant problems for both part-time faculty and educational institutions.

Adjunct faculty generally will not be employees under the Supreme Court’s test, because they are not regular salaried employees receiving benefits. If the school wishes to own the materials of its adjunct faculty, the school must enter into a written agreement stating that the courses are work for hire as specially commissioned works, rather than in the course of the adjunct’s employment. A better alternative is for the adjunct to sign an assignment of copyright to the academic institution.⁸⁰ An adjunct who teaches at more than one institution should consider licensing the use of the materials to each institution on a non-exclusive basis, retaining ownership and the ability to develop new materials from semester to semester.

D. Teacher’s Exception to the Work-for-Hire Doctrine

In addition to the issue of employment status, a second question to be answered is whether the materials have been prepared in the scope of the person’s employment.⁸¹ This issue has generated significant consternation among faculty members who fear encroachment into their autonomy in scholarship

and having to share revenue generated from projects that may create commercially viable products.⁸²

For class assignments that are part of a full-time faculty member's normal teaching schedule, both criteria embodied in the 1976 Copyright Act are typically going to be met. The employment status satisfies the first element of the test, and the nature and purpose for which the teaching materials are prepared supports the second element that the work be prepared in the scope of employment.⁸³ Few educational cases have analyzed this issue. Typically, however, even if the instructor has not been directly supervised by the school, classroom and testing materials are used directly for the benefit of the institution's students. In looking at the copyright ownership of a course outline, one lower court explained that a course outline "was connected directly with the work for which [the teacher] was employed to do and was fairly and reasonably incidental to his employment."⁸⁴ Direct supervision was not required.⁸⁵ Further, the notion that a common law tradition survives, despite the language of the statute, may be undermined when the academic tradition that gave rise to that tradition is itself transforming through the growth of new teaching media.⁸⁶

Full-time faculty members may also retain certain ownership in works they create, if those works are not within the scope of their employment or if the parties agree to another arrangement in writing.⁸⁷ Under a common law exception to the work-for-hire doctrine known as the teacher's exception, work-for-hire had not applied to faculty members' academic writings under the 1909 Copyright Act.⁸⁸ Significant controversy exists whether this exception survives the enactment of the Copyright Act of 1976. For most tenure-track faculty positions, academic writing remains a requirement of the job.⁸⁹ Faculty members often receive mentoring by peers, secretarial and administrative support and sometimes receive stipends or other additional compensation.⁹⁰ As such, the academic writings are part of the employment because they are obligations undertaken in order for the faculty member to receive tenure.⁹¹ Nonetheless, most colleges and universities have historically never sought ownership of their faculties' academic writings and have either waived claims of ownership through collective bargaining or through common practice.

In two decisions, the Seventh Circuit has strongly suggested that the doctrine does or should survive the re-codification of the 1976 Copyright Act.⁹² Neither case represents strong legal authority, because in both cases the court was addressing this topic even though it was not in dispute between the parties. More importantly, the emphasis was on "academic books and articles."⁹³ The court stated that "the universal assumption and practice was ... that the right to copyright such writing belonged to the teacher rather than to the college or university [because the college or university] is poorly equipped to exploit their writings, whether through publication or otherwise"⁹⁴

Such an assertion by the court is baseless and unsupported. It ignores the value of research to an academic research institution, the importance of scholarship in the development and training of the institution's employees and creates a perverse incentive for universities to commercialize scholarship as a means of demonstrating ownership in the faculty's work product. Despite the increasingly important role scholarship plays throughout higher education,⁹⁵ the recitation of the need for a continuing teacher's exception does not flow either from the text of the statute or the institutional realities of the academic community.

The reasons for providing a teacher's exception to the work-for-hire doctrine flow primarily from the desire to provide faculty sufficient autonomy from their employers and a realization that the relationship between scholarship and incentives at most institutions is a very poor fit,

dual nature of schools—as both creators and consumers of intellectual property—must be taken into account when creating policies for the creation, adoption and use of intellectual property in the developing, distance education marketplace.

particularly for faculty who have achieved tenure and are no longer directly measured by their scholarly output.⁹⁶

To solve these problems, some school policy manuals incorporate the teacher's exception into school policy, disclaiming the employer's copyright. This further indicates that any custom underlying the teacher's exception has been replaced by negotiated academic policies.⁹⁷

The Copyright Act specifically provides that the transfer of copyright by the employee may be altered by the parties, so long as “the parties have expressly agreed otherwise in a written instrument signed by them.”⁹⁸

E. Joint Works

Websites and other course materials are often developed by more than one person. Assuming the works were not created as works for hire, the copyright in such works will be jointly owned. A joint work is “a work prepared by two or more authors with the intentions that their contribution be merged into inseparable or interdependent parts of a unitary whole.”⁹⁹

Again the legal standard has two elements. First, each of the parties must be an author, meaning that he or she must have contributed some original material to the joint work. For example, if one author writes lyrics and the other writes songs, their collaboration is a joint work. Similarly, it is a joint work when one person writes functional computer code and another provides the graphic design to implement its use on a website. The second requirement is that both parties intend the work to be a joint, collaborative effort. This element is included to protect an author from losing exclusive ownership to editors or other individuals who often provide essential but relatively modest changes to the work.¹⁰⁰

F. Transfers of Copyright: The Practical Alternative to the Work-for-Hire Doctrine

Copyright is often described as a “bundle of rights” that can be separated into any number of exclusive and non-exclusive transfers.¹⁰¹ This bundle can also be divided into smaller sticks and twigs, if done using very carefully crafted exclusive licenses. As professor Nimmer has explained, “[a]n exclusive license, even if it is ‘limited in time or place of effect,’ is equated with an assignment, and each is considered to be a ‘transfer’ of copyright ownership.”¹⁰² These exclusive rights can be granted for a specific period of time, for a geographic location, or for a particular use.¹⁰³ “Indeed, there would appear to be no limit on how narrow the scope of licensed rights may be and still constitute a ‘transfer’ of ownership, as long as the rights thus licensed are ‘exclusive.’”¹⁰⁴ So, for example, an adjunct professor could create an online

course that she licensed to University X for two years, granting University X exclusive rights to the course materials in its state for undergraduate education. That license would still permit the adjunct professor to license the online course to colleges outside of University X’s state, to license the course to high schools or graduate schools, and to enter into any other form of licensing relationship at the end of the two year period.

For the transfer to be exclusive, it must be “in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”¹⁰⁵ This is best done with a signed contract, but a series of letters may suffice, since the statute requires only that the granting party sign the transfer. Non-exclusive grants need not be in writing and may be either oral or implied from conduct (e.g., providing copies for use).¹⁰⁶ An oral promise to transfer copyright exclusively cannot be enforced, but the courts will sometimes allow at least a non-exclusive use based on the implied transfer that such an unenforceable promise signifies.¹⁰⁷ Similarly, absent any understanding between a school and the owner of course materials or a website, a history of allowing the materials to be reprinted or used in other ways can create an implied, non-exclusive license.¹⁰⁸

Although seldom mentioned, this same issue applies to copyrighted materials authored by the students in the online setting. If the faculty member wishes to publish the students’ work on the Internet, the faculty member or the educational institution should have express permission to do so. While the student typically grants such permission implicitly through his or her participation in the course, a student who objects may have a legitimate claim to refuse to grant permission to the faculty member to republish the copyrighted work online.

Assuming that the use by the faculty member of the student’s work is non-exclusive, the student need not provide a signed authorization.¹⁰⁹ Still something more than simple acquiescence should be relied on, particularly if the use is going to continue beyond the end of the student’s enrollment in the course for which the work was created. The educational institution can adopt a policy enforced through its enrollment policies, or each faculty member could incorporate into his or her syllabus a statement that notifies students that their work will be subject to a non-exclusive license to the institution.¹¹⁰ The scope of this non-exclusive license

should be sufficiently broad that it covers those uses expected by the school, but not so broad that it raises concerns about the student's interest in controlling his or her own academic developments and scholarship.¹¹¹

Given recent trends that suggest teaching assistants are increasingly beginning to make professional demands on their academic institutions, the status of graduate student teaching assistants should also be set forth expressly in writing.¹¹² Ironically, the success of graduate students in establishing collective bargaining rights could serve to undermine their claims to copyright in their works, absent an agreement that specifies ownership and licensure.

IV. Limits on the Copyright Holder's Exclusive Rights

The exclusive rights vested in the copyright owner are not absolute. They are subject to both practical limitations and legal constraints. While tempting, educational institutions must be particularly sensitive to the ethical issues involved in unauthorized copying.¹¹³ Presumably, all institutions strongly disapprove of plagiarism,¹¹⁴ which serves as a moral or ethical code, rather than as a legal doctrine.¹¹⁵ The disapproval of plagiarism (although inherently quite distinct from copyright) shares a common theme with copyright in that much of the limitations on copyright infringement come from a moral, rather than legal, imperative not to steal another's work.¹¹⁶

This normative role for intellectual property law will not be developed here, but it remains a central part of the uses to which intellectual property is put by educational institutions. Our schools establish one of the key means for defining legally and culturally acceptable ideas in our society. "Through nurture, socialization, and education, we are exposed to and socialized into some common views of the right and the wrong, and gradually led to an ability to be at least partly self-regulating against the standing norms implicit, and partly explicit, in this common view."¹¹⁷

In the world of academia, it is only against this normative backdrop that the battle over limitations on the exclusive rights of copyright holders has been fought. Copyright owners claim protection of their income and control over the use of their work.¹¹⁸ Teachers repeat frustrations regarding the cost of materials, the delays inherent in gaining copyright clearance and the inability to locate the correct parties from whom to acquire

permissions.¹¹⁹ Photocopy centers, Internet service providers and school book stores are trapped in the middle, working to accommodate all the competing legitimate interests.¹²⁰ These competing tensions have resulted in shaping the doctrine of fair use and other exemptions to copyright exclusivity enumerated in the statute. Each of these is detailed below.

A. Fair Use

Fair use serves to provide a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without [the copyright holder's] consent, notwithstanding the monopoly granted to the owner"¹²¹ This is a privilege that should not be abused. Given the need for restraint, educational institutions struggle to determine what are the appropriate guidelines for using copyrighted works without express permission. The fair use doctrine provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."¹²² This protects the public's need to comment on a work, to quote portions in other critical works, and to build upon previous works.¹²³ Fair use is an equitable test that balances the copyright holder's property interests with the public's interest in teaching, commenting and critiquing.¹²⁴ The doctrine was a judicially created limitation on the rights embodied in federal copyright law that was not added to the statute until the codification of the 1976 Act.¹²⁵ "The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.' "¹²⁶

Procedurally, fair use is an affirmative defense to a lawsuit brought by the copyright holder for improper copying. As such, the burden is on the copier to establish that the amount copied was appropriate under the circumstances.¹²⁷

Borrowing materials for use in the classroom, course materials and, particularly, websites is not uncommon.¹²⁸ Despite the common occurrence of this copying, the practice creates strong potential for copyright violations by the instructor and the school. This is particularly true for websites, where materials are made available to the general public, because class-oriented websites are not limited by passwords or other institutional mecha-

nisms.¹²⁹ The posting of copyrighted material on a website is copyright infringement, unless there is an exception to the exclusive rights of the copyright holder.¹³⁰ The fair use doctrine provides the greatest flexibility for the faculty member or institution operating a website and hoping to use the work of another.

The 1976 Copyright Act codified the traditional, common law fair use doctrine and provides four factors to consider when assessing ‘whether the use made of a work in any particular case is [] fair’: (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.¹³¹

Although each of these prongs is discussed by courts when assessing any claim of fair use, the first and fourth prongs tend to be the most important. If the copying stymies the economic opportunity of the copyright holder, courts are much more likely to find infringement, than if the use could not result in any economic detriment to the copyright holder.¹³² While the balancing test also includes an evaluation of the nature and extent of the use, the nature of the work and the market for the work, use by a for-profit business without permission suggests that the use is not a fair one.¹³³ For example, unless the material is in the public domain, use of clip art must be licensed.¹³⁴

For academic institutions, fair use met its most significant milestone recently with the decree that standardized the rules for operating copy centers. In 1991, a lawsuit against commercial photocopy center Kinko’s in New York established legal precedent that a copy center would be held liable for copying copyrighted works on behalf of students, at the request of college faculty.¹³⁵ The coursepacks created by Kinko’s at the behest of NYU and Columbia faculty were held to be violations of the publisher’s copyrights, and Kinko’s was violating the copyrights by reprinting the coursepacks without paying royalties.¹³⁶ That decision has been respected

by all other courts addressing the issue.¹³⁷ Today, most educational institutions have policies and practices that undertake to comply with the *Kinko’s* decision and the obligation to obtain copyright clearance for materials that are printed and sold.

Nothing in the law or applications of the fair use doctrine to the Internet suggest that any different result will occur online. With increasing ease, faculty members may now post significant amounts of copyrighted material to class websites, eliminating the steps of physically compiling a course pack complying with a photocopy center’s copyright clearance policy. This has the added benefit of allowing students to download all of the materials, and print only those portions each student thinks most useful.¹³⁸ For materials available elsewhere on the Internet, faculty members sometimes post only links to those other materials.¹³⁹

Because of the problems that occur when a site linked to the instructor’s website becomes unavailable, instructors often post the course materials on the class website, regardless of whether the materials are otherwise available at other Internet sites. This constitutes copying the copyright holder’s work and may also constitute redistributing and displaying it to the students in the class, or the general public.¹⁴⁰

Even works otherwise available on the Internet are protected.¹⁴¹ The fact that a work is free to the public on a particular website does not mean that the work can be re-posted to a second website without permission. While fair use provides for some permissible unauthorized posting of copyrighted material, the doctrine is becoming increasingly narrow.¹⁴² Over the first few years of the Internet’s growth, charging for content has been done only infrequently. As the medium matures, however, this is likely to change.

As a result, instructors must be aware that the same fair use principles that govern coursepacks should be applied to *virtual* coursepacks as well. In both instances, a series of industry guidelines have been developed that assist institutions in understanding some of the parameters governing fair use. The first is the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (the “Classroom Guidelines”).¹⁴³ These guidelines were the result of negotiation and agreement among the Ad Hoc Committee of Educational Institutions and Organizations on Copy-

right Law Revision, the Authors League of America, Inc. and the Association of American Publishers.¹⁴⁴

The Classroom Guidelines provide for a minimum rather than a maximum of allowed unauthorized copying.¹⁴⁵ Nonetheless, the minimum is somewhat of a misnomer, because it is the minimum below which the Authors League of America, Inc. and the Association of American Publishers will not challenge the unauthorized publication, rather than any express license or grant. As the *Kinko's* court put it, “fair use standards may be more or less permissive.”¹⁴⁶ As a result, the Class Guidelines can serve in only that capacity—as guides rather than rules. On the practical, or normative level, however, the adoption of the Class Guidelines will discourage complaints and litigation by most copyright holders because they provide a widely-recognized standard of conduct.

The Classroom Guidelines for copying and distributing textual materials are also limited to *nonprofit* educational institutions.¹⁴⁷ Increasingly, however, the advances in technology have led for-profit entities such as University of Phoenix and Argosy University to provide for-profit education.¹⁴⁸ These guidelines are inapplicable to for-profit uses, and the commercial nature of the enterprise will invariably narrow the scope of permissible fair use.¹⁴⁹ Since copying is generally not transformative when an instructor reproduces materials to distribute to students,¹⁵⁰ the factors suggest that fair use in this context will be very limited.

In the for-profit educational setting, little or no reliance should be made on fair use. In the nonprofit educational environment, the Classroom Guidelines provide a solid framework for structuring a policy for in-classroom use. Because the Classroom Guidelines refer to the copying of text, they seem to work equally well whether the materials are printed and physically distributed or posted to a website that can be visited only by the enrolled students.¹⁵¹

With the use of bulletin boards, listservs and chat-rooms, both the instructor and the students have the ability to copy and distribute copyrighted materials. Students, educators and the public should remain mindful that the placement of copyrighted works on the Internet does not make that work part of the public domain, or otherwise free to copy. These are all policies of intellectual honesty. Thus, instructors should take steps to protect the copyrighted works

of others from unnecessary copying or distribution at the outset of the distance learning experience.¹⁵²

B. Classroom Performance Exemptions and Their Application to Distance Learning

Although the fair use doctrine provides the broadest general exception to the exclusive rights under copyright law, a number of other sections of the statute provide additional limitations as well.¹⁵³ For educators, the most significant limitations to copyright beyond fair use are embodied in section 110 of the Copyright Act.

For “face-to-face teaching activities” the statute gives faculty members wide latitude to perform copyrighted works as part of the class, including music, television programs and films.¹⁵⁴ To meet these standards, the performance must be (1) operated by the classroom instructor, (2) in “a classroom or a similar place devoted to instruction” and (3) in a live teaching environment that is not mediated through distance technology.¹⁵⁵ As a result, an instructor is allowed to perform or display any work in class. This includes encouraging students to perform scenes from a play, read text aloud, play music or show motion pictures. The presentation must be in a classroom rather than transmitted between rooms, and the copy used for the performance or display must itself be a lawful rather than pirated copy.¹⁵⁶ While this law provides tremendous flexibility for the live classroom instructor to bring the Internet into the classroom, it does not provide any copyright protection for distance instruction.¹⁵⁷

Further, the exemption in section 110(1) has some important limitations. First, it does not include reproduction or distribution rights. This means that display in class using a high quality document projector would be acceptable whereas the scanning of the image into a PowerPoint presentation would include the act of reproduction that is not permitted under this exception.¹⁵⁸ If the creation of the PowerPoint presentation required changing the work by cropping, re-coloring, editing or annotating, the creation of the slides would also constitute the creation of a derivative work, which is also beyond the scope of the in-class exemption and is permitted only if allowed under the fair use exception.

Second, the exemption is limited to the classroom, so any archive posted to a website of the class presentation, or any posting to a class website of the materials

displayed in class would fall outside of the exemption. As such, the exemption provides great protection for in-class activities, and significantly less protection from liability for use of new technologies. And, most significantly, it is inapplicable when those activities involve distance learning tools or applications.

For out-of-the-classroom activities, copyright law has a much more narrow provision that may accommodate some forms of distance education. Under section 110(2) of the Copyright Act, a nondramatic literary or musical work may be transmitted or broadcast to another classroom or directly to the student if the student's disabilities or other special circumstances require that the student learn outside of the classroom.¹⁵⁹ The law was not drafted to include "special circumstances" such as work schedules or the myriad issues that cause students to enroll in distance education, so the provision is extremely limited in application. Further, the language of the section does not include copying or distribution, so an educator would be hard pressed to comply with this provision when teaching using modern, distance learning techniques.¹⁶⁰

Finally, it should be noted that the broadcast exemption applies only to nondramatic, literary or musical works. This excludes traditional entertainment products such as movies, operas or musicals—works that tell a story. Text-based teaching materials are nondramatic. Songs, apart from the story of a musical, are also non-dramatic. Educational materials, however, may range widely and some will include dramatic works that cannot be broadcast without the copyright holder's permission under this section.

The scope of section 110 has come under increasing attack because of its narrow reach and inapplicability to distance education. In anticipation of the problems section 110 would create as distance education grows, in 1998 Congress ordered the

The Register of Copyrights, after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.¹⁶²

The Copyright office conducted an extensive comment and hearing process that resulted in a comprehensive study on the need for amendment of the Copyright Act. At the heart of the findings, the Register's report concluded that "the Copyright Act should be amended in several respects in order to promote distance education through digital technologies."¹⁶³ The essence of these recommendations is to expand the exemptions of section 110(1) to eliminate the classroom limitations by "updating section 110(2), the exemption for instructional broadcasting, to allow the same types of performances and displays it currently permits to be delivered by means of digital technologies, and received by students in remote locations, whether or not in a physical classroom."¹⁶⁴

Congress has begun the process of adopting the Register's recommendations.¹⁶⁵ Under a bill pending before Congress, the in-classroom limitations of section 110(1) would be extended to distance education. The limitations would also closely mirror section 110(1). The materials eligible are those intended for in-class activities rather than those typically used "in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material ... which are typically purchased or acquired by the students"¹⁶⁶ The material must be "directly related and of material assistance to the teaching content of the transmission"¹⁶⁷

and limited to the enrolled students (to the extent technically feasible).

In addition, the institution must provide copyright notices on the material and provide "informational

posting of copyrighted material on a website is copyright infringement unless there is an exception to the exclusive rights of the copyright holder. The fair use doctrine provides the greatest flexibility for the faculty member or institution operating a website and hoping to use the work of another.

Register of Copyrights to prepare a report on the applicability of section 110 to distance education.¹⁶¹

materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright ...”¹⁶⁸ This latter provision again reinforces the increasing importance of education and normative practice regarding copyright policy and regulation.

This amendment to section 110(2) will not preclude fair use for the multitude of situations that are not anticipated under the proposed amendment. It is also unclear whether the bill will ultimately be enacted. In the interim, the bill and the Register’s recommendations support limited fair use of copyrighted materials in the distance learning environment.

C. The Safe Harbor for Operating Online Services: Copyright Infringement by Students and Others

In addition to potential liability for direct copyright infringement by faculty members and academic institutions, educational institutions also may face liability for copyright infringement by its students and users. A third party may become liable for copyright infringement caused by another party in two separate situations.¹⁶⁹ A party may be responsible under the theory of vicarious liability for the conduct of its agent or servant,¹⁷⁰ or it may be responsible for materially contributing to the infringement of another party.¹⁷¹

Although contributory and vicarious liability are quite similar, each has specific legal requirements. The typical relationship for vicarious liability is that of employer-employee, in which the tort liability of the employee transfers to the employer.¹⁷² Applied to copyright, however the doctrine is not that limited. “[E]ven in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁷³ These twin requirements of right and ability to control and direct financial interest have been increasingly easy to establish under copyright law.¹⁷⁴

The Ninth Circuit’s decision in *A&M Records v. Napster, Inc.* modified the meaning of control by transforming the traditional employment criteria into a broad relationship based on Napster’s ability to find infringing material on its system and to terminate the accounts of its

users.¹⁷⁵ Under this standard, virtually every academic institution receives revenue directly or indirectly based on student participation and has the ability to set policies for students and terminate access if students violate those policies. As a result, the common law vicarious liability standard creates the potential for significant liability for academic institutions.

Similarly, academic institutions may be liable for contributory liability in certain situations. To be liable, it must be established that the college or university has knowledge of the infringing conduct and materially contributes to the conduct.¹⁷⁶ Knowledge has generally been held to mean that the party “know or have reason to know” of the direct infringement.¹⁷⁷ Material contribution may come from providing the online service used for infringement. But in the context of distant education, this standard should be more rigorous and require that the contributory infringer provide something more specific than access. As in *Napster*, promoting infringement or otherwise encouraging it should remain sufficient to establish secondary liability.¹⁷⁸

Because of the overwhelming potential for secondary copyright infringement, Congress has provided statutory protection that will serve to limit liability if the requirements in the statute are followed.¹⁷⁹ These provisions all require that the infringing material be posted by someone other than the Internet service provider (“ISP”).¹⁸⁰ Academic institutions often meet the definition of an ISP. The first two provisions of section 512 limit liability for material that is transferred through the ISP’s digital network or is archived as a result of that transfer. This sort of distribution and recordation will not result in copyright liability.¹⁸¹

When the academic institution is an ISP because of the facilities it supplies to its students and the academic community, it has a limited safe harbor from copyright infringement caused by its students or others.¹⁸² As an ISP, the institution avoids liability for the copyright violations of its students if it did not author or otherwise directly control the content of the postings, if it has a policy discouraging copyright violations and if it promptly removes offending material from the website in accordance with the statute.¹⁸³ The school must also make available the name and contact information of the party to receive notices of alleged copyright infringement.¹⁸⁴ The school has an obligation to notify

the party who posted the materials. If that party objects to the removal, the school can re-post the information after ten days, unless a court has ordered another course of action.¹⁸⁵ The ten days provide the parties involved an opportunity to come to court to request a temporary restraining order.

The limitations embedded in section 512 also reflect common notions of secondary liability. If the educational institution has knowledge of infringement, supplied through the notice provisions, it must then undertake to eliminate the offending material. Although the statute does not state it explicitly, the institution may also wish to reserve the right to close any account of a party who is the subject of one or more notice and take-down procedures.¹⁸⁶

Congress also recognized that the relationship between the academic institution and its faculty is not always simpatico. To allow for those situations when the academic institution needs to distance itself from the copyright violations of its faculty members (including graduate students), Congress has provided a very narrow additional exemption from liability.¹⁸⁷ If the copied material is used for online course activities, the school cannot absolve itself of its vicarious liability arising from the conduct of its instructors, but if the material is used for other purposes—such as scholarship—then the relationship is less direct, and a safe harbor may be available.¹⁸⁸ Additionally, as a prerequisite for immunity, there can be no more than two notices of potential copyright infringement in the proceeding three years, and the institution must provide a copyright policy that promotes compliance with copyright provisions.¹⁸⁹ If any of these provisions are not met, the institution loses the benefit of the safe harbor and its immunity will be stripped away. As a result, institutions should be highly motivated to monitor the activities of faculty members and graduate students using online tools.

D. Licensed Structure and Format: The Real Solution to Copyright Problems in the Distance Education Context

Given the narrow applicability of the fair use doctrine and section 110 to distance education, the primary method of obtaining and using copyrighted material is by licensing it. The importance of licensing content for

distance education cannot be understated. Licensing content owned by other parties provides another effective strategy for dealing with copyright issues. Many commercial publishers make course materials, news feeds, customized content and other changing, topical information available for website publishers. This transfers the obligation of content creation to a third party, may substantially reduce the cost of creating content and may result in dynamic, timely presentations.

As discussed above, it is important that copyright and intellectual property interests be respected with regard to use of the Internet. If an institution is relying upon third-party developers to put together its website, before the website is designed the parties should establish what materials and content will be incorporated into the site and who owns those materials.

The company purchasing the website design may not be able to insist that it be the copyright holder of the website for practical reasons. Many of the elements utilized on a complex webpage may be built from software programs owned by the independent contractor creating the site and used repeatedly by that vendor on site after site. In those situations, a more specific license agreement should be used, itemizing what works are granted by a non-exclusive, perpetual license to the institution and what materials are assigned to the company. The academic institution should be wary of short-term licenses because those licenses will likely result in renegotiation of the website contracts or redesign of the website itself.

The issue of website design is more critical if the site includes information from multiple parties or obtained through affiliated organizations. When a third-party web-host is used, the contract should clearly provide who owns the data that is generated (names, addresses, etc.) and what usage rights the other party has to that data.

Another issue that may arise from the website design concerns the allocation of duties and responsibilities, including the obligations to select, edit and post the content on the website, defend the parties from litigation, and indemnify the parties from losses resulting from the website's operation. Webpage designers range from graphic artists who happen to use the computer to sophisticated software programmers who customize each application to the needs of an individual client. The specifications of the website, its operations, suite

of customer services and general design should all be specified in advance in the design agreement. Finally, the agreement should provide for testing of the site and, to the extent it is an interactive site, maintenance and updating of the software embedded in the site.

V. Limitations Beyond Copyright

In addition to the potential problem of copyright liability, there are a variety of similar potential problems for academic institutions providing distance learning environments. The Internet creates a platform for any person or institution to become a commercial publisher with the push of a button. For most educational institutions, common law publication obligations remain in full force on the Internet. The law of defamation and of common law privacy remain significant restrictions on unbridled use of the Internet for publication.

A. Defamation Law and Privacy Rights

The issues involving common law defamation and privacy rights are not unique to educators on the Internet. The potentially volatile nature of instantaneous publication should make academic institutions aware that dangers may exist.¹⁹⁰ Policies that require editorial control, content review and regular policing should be adopted and enforced so that the organization does not find itself embarrassed or liable for the words published on its behalf.

A statement is defamatory if “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹⁹¹ Under the common law, a statement was considered defamatory if it held one out for hatred, ridicule, or contempt.¹⁹² Any publication to a third person, such as through publication on a website or through sending an e-mail, will give rise to liability. Even if the statement is not made directly by or on behalf of the organization, the organization may be liable if it republishes the statement by posting another’s material to the website, or if it fails to take reasonable steps once it is made aware that defamatory material has been posted on its online facilities.¹⁹³ As a result, a school is responsible for defamatory material in work it creates, licenses or republishes.¹⁹⁴ It will also be liable for defamatory works posted to its site by third parties if it fails to remove the

defamatory material once it is on notice of the content.¹⁹⁵

In distance education, any content published by the school or its employees can result in liability for the school if the material is found to be defamatory. If the allegedly defamed party is a public official or public figure, that party must prove that the statement was knowingly false or made with reckless disregard to the truth.¹⁹⁶ If the party is neither a public figure nor a public official, the school will be liable if the person can establish that the material was posted negligently.¹⁹⁷ The republication of libels found elsewhere is subject to the same standards.

As part of the Communications Decency Act of 1996, Congress exempted ISPs from state or federal liability for defamation that was created by other parties.¹⁹⁸ The law (which remains in effect despite other portions of the Act having been declared unconstitutional) provides the following: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁹⁹ An “interactive computer service [is] any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet”²⁰⁰ An “information content provider [is] any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²⁰¹ Under the policy created by Congress, a school or institution that provides e-mail and Internet accounts for its students should be treated as an interactive computer service protected by the statute. As a result, the institution will not be automatically liable for postings by students or other parties that are defamatory.

The statute, however, does not eliminate liability for postings made by or on behalf of the school. Such postings will certainly include those by faculty or other employees of the institution acting in their professional capacities. This also could extend to include postings by students acting at the behest and under the control of a faculty member.

Further, the law specifically states that the interactive service company will not be considered a publisher or speaker for purposes of the law. That leaves intact the common law rules regarding republishers of defamatory

information. Under the common law, a bookstore or other re-seller of defamatory information could be held liable if that person was informed of the defamatory information and failed to take reasonable steps to remove the offending materials. Nonetheless, the Fourth Circuit, as the first appellate court to review the application of the provision, has extended section 230 to limit liability and immunize ISPs from republisher liability as well.²⁰² Since then, a number of additional courts have expanded the reach of section 230 to remove all liability.²⁰³ Nonetheless, the language of the statute leaves open the possibility of third-party liability. This is particularly true if the third party has an affirmative obligation regarding the postings because the libelous statements were among enrolled students and the supervising faculty member or the institution failed to respond to the request that the offensive material be removed.

In addition to traditional defamation, the common law doctrine of false light creates liability for invasion of privacy by giving a person “unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.”²⁰⁴ Even if the statement is laudatory, it may be actionable if it is highly objectionable and false.²⁰⁵ False light has evolved into a close approximation of defamation for those statements that are injurious but not so contemptuous as to be defamatory. As such, privacy invasions are intentional torts requiring intent or reckless disregard of the truth, rather than the negligence standard available for libelous statements made regarding private persons.²⁰⁶

In addition to false light, other privacy invasions may be actionable. Unwanted, highly offensive, broadly disseminated publication of one’s personal information remains a common law tort susceptible to Internet abuse.²⁰⁷ Broad publication of a person’s physical or mental health issues may result in liability as would any number of other statements that are true but highly embarrassing when broadcast to the public and of little public concern.²⁰⁸

Another aspect of privacy is the publicity rights of those whose name, likeness or other identifying information is used on a website.²⁰⁹ States like New York and California, in addition to many others, afford broad protection to these rights. The California statute is representative.

Any person who knowingly uses another’s

name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.²¹⁰

Courts have recognized that use of a website to promote the goods or services of an organization may be deemed a commercial use.²¹¹ Further, most states do not require that the photographs be of famous people.²¹² Showing recognizable individuals from events or panel discussions creates the impression of association with an institution’s activities or services and requires the permission of each person who is identifiable in the photographs.

When using photographs on websites or streaming video and audio presentations, publicity rights can become a serious concern for colleges and universities. The use of this content in a restricted course website should properly be treated as non-commercial, and therefore outside the framework of publicity rights. The same, however, is not true for names, photographs, audio recordings and other aspects of one’s identity when they are used on public websites designed to promote the school or traffic to the site in general. In this setting, the use of a person’s identity is a form of commercial activity (advertising or promotional in nature) and the permission of the person is generally required prior to use.

B. Linking and Framing: Online Trademark Issues ... and a Bit More

Another common use of a website is to link that site to others on the Internet by adding a hyperlink address to a webpage owned and operated by another party.²¹³ Although a common practice, linking raises some legal issues that educators should recognize.

Until very recently, there seemed no significant concern that linking violates the copyright of the site being linked. The address itself is a fact that cannot be protected by copyright.²¹⁴ In addition, at least one court has even suggested linking as a way for a defendant in an infringement action to avoid liability.²¹⁵ Despite this, in at least one situation, *Kelly v. Arriba Soft Corp.*,²¹⁶ the Ninth Circuit has now held that “inline links” can give

rise to a violation of the display right of a third party website.²¹⁷ In *Kelly*, the court found that linking a search engine to full-quality graphic images on third-parties' websites was a violation of the display rights in those third parties' websites.²¹⁸ Although the court correctly asserted that one can display a copy of a work when showing the "material object 'in which the work is first fixed,'"²¹⁹ this merely means that a television camera pointed at an original oil painting would be a display of the material object in which the work was first fixed. The court asserted that since the original work may be displayed, a link to that work is also a display.²²⁰ This assertion ignores the fact that it is the viewer who calls up the images directly from Kelly's server to his or her own computer for viewing. Arriba's search engine provides the link to the graphic image involved, but it does not copy the file, retransmit it or play any intermediary role in the viewer calling up the image, other than providing the IP address.

If this case sets the new standard for display rights, then many presently acceptable practices may be violations of display rights. Fortunately, the court did find that the remainder of the search engine fell within

the fair use exception, so the implications may be a bit more modest than one might otherwise fear.

As a result of this turn of events, a faculty member pointing out information to students on other websites should be particularly conscious to have the students open those sites directly rather than as frames within the faculty member's course pages. Students may sometimes be required to enroll in the course as a condition of reading the content, and they should be instructed on this obligation in advance.

The situation where the Ninth Circuit's approach could have the greatest impact is in deep linking. This occurs when the link offered by the faculty member bypasses layers of information that the author of the linked site had intended the viewers to see. This process, sometimes referred to as "deep linking," may result in directing students past pages with a company's advertising. Although not a significant legal risk, it is conceivable that deep linking may give rise to liability on

contract or trademark grounds, or as an extension of the *Kelly* decision. If the website's usage policy prohibits any linking to the page for commercial use, then this contract may be enforceable.²²¹ Enforcement is more likely if the prohibition is embodied in an agreement that requires the user to affirmatively acknowledge it, rather than if the provision is buried in a hard-to-find page of terms and conditions.²²² The use of inline linking as described in *Kelly* may also trigger usage issues when the links avoid some of the copyright owner's other content.

A remaining concern with linking is the extent to which the design of a webpage may create the false impression that the content is created by the linking site. Trademark infringement may arise from deep linking, if the referencing page and the selected deep link are such that users will likely be confused as to the source of the linked pages. In addition, linking may, in some situations, suggest that the linking site endorses the content

at the linked site or suggest false authorship or affiliation of the author. Also, if the linked pages are violating copyright law or the privacy or publicity rights of a third party, the linking site should be under an obligation to remove the links to that

site once it is aware of the infringing or tortious conduct.

In addition to linking, framing may give rise to liability.

Framing enables a Web page designer to split a page into independent scrollable regions, each capable of displaying a separate and distinct external Web page. Rather than having to leave the screen of one Web page to access another, the framing feature allows a user to 'display' a portion of a separate Web site on the one originally accessed.²²³

This practice creates far more potential liability than the acts of linking one site to another. In fact, it may have been framing that the court in *Kelly* was trying to address when it described "inline linking and framing."²²⁴

The frames can create the mistaken impression that the computer user is receiving content or services from one website, when another source is actually providing

frames can create the mistaken impression that the computer user is receiving content or services from one website, when another source is actually providing the data.

the data. For example, *Total News* created frames which it used to provide news stories of interest to its readers. The news content, however, came from publishers such as *The Washington Post*. *Total News* never copied the stories, but by framing the news with its own advertising, it used the content of other publishers to help it sell advertising.²²⁵

Because it does not involve direct copying, many commentators do not believe framing is a copyright violation. Nonetheless, framing may be construed as creating a derivative work, or creating a likelihood of confusion when it adds to or hides the trademarks of the content provider. In addition, as discussed by the Ninth Circuit, a broad reading of display rights could mean that the joint image is a display of the source work by the framing website, violating the exclusive rights to display.²²⁶

Wherever possible, cooperative licensing agreements should be utilized to eliminate any issues regarding the scope of permissible conduct. Such agreements should protect the trademarks of both parties to the agreement, outline the acceptable uses to which each party can put its website and provide for mutual policing of the Internet for potential misconduct. The license agreement may also serve as evidence regarding the value of a webpage's content and enforceability of the publisher's rights in future litigation.

Other techniques are also available to promote website transactions that may create potential legal issues. For example, metatags are words embedded in a website that allow Internet search engines to locate a site. Some search engines prioritize a site by the number of times the term appears in that site.²²⁷ The use of metatags is a common practice. The legal question that arises in this context is whether the use of trademarks from competitors or other third parties constitutes an infringement of those trademarks. The use of a competitor's metatag allows a competitor to appear on a search engine list when a consumer types another company's name.

For example, by embedding "Barbie" in an adult website, that site appeared on searches for Mattel's doll.²²⁸ The potential for infringement may exist if the extensive use of the competitor's trademark and the design of the website will lead to a likelihood of consumer confusion. Assuming no trademark infringement arises from the domain name itself, or other conduct, limited use of trademarks in the metatags

should not be sufficient to create a likelihood of confusion or dilution of a famous trademark.²²⁹

The issue of linking metatags to the advertising of third parties has also been tested in court. Playboy sued the Internet portal Excite.com for selling banner advertisements that were triggered by a consumer's use of the trademarked Playboy® or Playmate® as a search term.²³⁰ The court dismissed the trademark claim, because to recognize the claim would effectively hamper use of the English language, because an ever expanding list of words and phrases would be deemed proprietary information protected by law. The claim that the banner advertisements created initial interest confusion was also found wanting, because the advertisements themselves did not create any confusion. Nonetheless, Estée Lauder brought a similar suit against Excite.²³¹ Because Estée Lauder is a proper name, and the issue may also include the use of a name for commercial purposes, the analysis may be somewhat different.²³²

C. Policing a School's Trademarks and Domain Names on the Internet

Academic institutions should be careful to protect both the trademark of the organization and the domain name of its website.²³³ Companies must regularly audit the name to insure that others are not using it, or a close facsimile, as a domain name.²³⁴ An example of the difficulties faced in policing trade names is shown by the 2000 presidential race. Political organizations for both the Bush and Gore presidential campaigns were closely mirrored by parody sites.²³⁵ www.gwbush.com mocked the official www.georgebush.com site, while www.algore.org did the same to Gore's official site at www.gore2000.org.²³⁶ The parody websites may become an embarrassment, while more cleverly targeted sites could mislead potential students and donors. To the extent that these websites are trading on the confusion caused by using the organization's name, the organization should aggressively seek court protection of its trademarks to prohibit such confusion and commercialization.²³⁷

Confusing use of a company's trademark by a third party in a domain name is now actionable under federal law. Under the anti-cyberpiracy provisions of the Lanham Trademark Act,²³⁸ a party who registers a domain name using the trademark of another party with the intent to resell the mark or use the mark in a manner

that would create public confusion will be held liable.²³⁹

In addition to policing the various top-level domains for uses of the company's trademark, a company must also police for similar uses of the mark. The practice of "typosquatting" is the practice of using domain names that include the common typographical errors to popular trademarks. For example, Foxmews.com is a site dedicated to promoting civil disobedience and anti-corporate activities.²⁴⁰ This practice, however, can be turned to a corporation's advantage. For example, Britannica Encyclopedia is available from both Britannica.com and Britanica.com.²⁴¹

Significant changes have also taken place that make the management of domain names more difficult. In November 2000, ICANN began the development of new, top-level domain names to complement the existing top-level domains, .com, .org., .gov., .edu. and .mil.²⁴² After much rancor and frustration, ICANN selected seven additional top-level domains which will be managed by contracts with additional registrars.²⁴³ The new domains are for the aerospace industry, ".aero," businesses, ".biz," cooperatives, ".coop," information, ".info," museums, ".museum," individuals, ".name," and "accountants, lawyers, physicians, and other professionals, ".pro."²⁴⁴ Although there has been little interest in these names—particularly with the slowdown in the number of Internet start-ups—good corporate planning demands that companies seek to capture the use of their trademarks in each of the available domains. The net effect has been very little traffic, but some increased revenue for registrars hosting multiple domains for the same companies.

Another aspect of domain name disruption has more practical significance for educational companies. The educational top-level domain, .edu, is a restricted domain which requires validation in order to use the domain. The U.S. Department of Commerce moved the management of .edu to the nonprofit organization Educause as part of a significant change in the management of .edu policies.²⁴⁵

As part of the transition, all existing .edu schools and colleges are being allowed to keep their existing domain names.²⁴⁶ For newcomers, to be eligible for the .edu top-level domain, the institution must be a "degree-granting institution of higher education accredited by one of the six U.S. regional accrediting bodies. Duly accredited community colleges and other two-year-degree institutions are thus eligible for the first time."²⁴⁷

For community colleges, this is a significant change. It is too early to tell whether it will have other effects.

D. Special Concerns for E-Mail Communications

E-mail allows a person to send a message to one or more recipients. It can also be used to attach other documents or software files. Once sent, an e-mail will travel an unpredictable path to its destination. Although e-mail is a basic tool of the Internet, a number of legal issues may arise from its use. Because e-mail is used for communications between members of a business organization both internally and with the public, a number of legal issues must be addressed through a comprehensive employment policy.

Most of these issues involve varying privacy rules. Because the rules of privacy vary with use, this remains an area of law that is subject to ongoing change. "Unlike postal mail, simple e-mail generally is not 'sealed' or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted)."²⁴⁸

The problems of security should always be considered when using e-mail. Changes in the importance and acceptance of e-mail, however, have changed the norms of privacy and security even though physical security remains low. E-mail is often used in a variety of situations that may involve private or even privileged content, such as student information covered by FERPA,²⁴⁹ labor issues involving faculty or communications involving attorney-client discussions.

Because e-mail is not secure, questions linger regarding its use for privileged communications. The fear of unsecured transmission has given way, however, to the ubiquity of e-mail and a greater expectation of privacy by users. Where legal privacy is sufficient, e-mail has become increasingly useful; where the unauthorized access to data could lead to theft of financial information or create national security risks, legal respect for the privacy of e-mail is insufficient.

Courts have applied the Electronic Communications Privacy Act ("ECPA") to criminalize the intentional interception of e-mail transmissions.²⁵⁰ Despite the ability to use e-mail for confidential communications, caution must still be used. Accidental transmission to third parties will waive any privilege to the communication.

In 1986, Congress amended the original Federal Wiretap Act with the ECPA to cover wired and wireless electronic communications. Although, as an example of the law's limited focus, Congress excluded wireless telephones because they were so easily intercepted.²⁵¹ In 1994, Congress plugged this hole and demonstrated that anti-interception laws were designed to stop interception of private communications, regardless of the ease of interception.²⁵²

Courts are no longer having difficulty finding criminal and civil liability for interceptions of e-mail.²⁵³ The interception of e-mail must come during transmission, however, rather than through the unauthorized reading of e-mail off another's computer screen or unauthorized access to the computer files.²⁵⁴

Given the statutory protection from the interception of e-mail, courts are validating the public's growing expectation of privacy in e-mail transmissions.²⁵⁵ Despite this, however, numerous exceptions exist to the ECPA. The first is a legal interpretation that retrieving a message from storage does not constitute interception, and therefore does not trigger the statute.²⁵⁶ Second, a communication may be intercepted if done with the consent of a party.²⁵⁷ This permission may be granted as part of the contractual conditions of employment of an employee or enrollment of a student. As a result, there should not be any reasonable reliance on the privacy of e-mail transmissions by corporate employees, except to the extent created or eliminated by the employment policy. Educational institutions may have significantly different policies governing e-mail monitoring of students and employees, and the institutions have an obligation to insure that the stated policies are followed. State-owned schools are additionally obligated under the First Amendment to allow students the right to communicate without regard to the content of their communications.

One of the primary reasons that academic institutions need policies to monitor e-mail is the potential liability that can occur from misuse. E-mail can be used to disseminate trade secrets and proprietary information very easily. Copyrighted computer files of documents, movies, music and software can be attached to e-mail for rapid duplication. E-mail can also be used to share jokes and personal information. This interaction, which leaves a permanent record in the corporation's data files, may empower employees who are acting improperly. For

example, Chevron Corp. was forced to pay four female employees over \$2.2 million as a settlement for sexual harassment, including an image of one employee

use of metatags is a common practice. The legal question that arises in this context is whether the use of trademarks from competitors or other third parties constitutes an infringement of those trademarks.

doctored to look obscene and offensive which was circulated over the company's network.²⁵⁸ Even if the defense of the lawsuit is successful, the costs may be formidable.²⁵⁹ The same policy that allows an employer to monitor e-mail, however, may also increase its obligation to monitor and intervene.

To the extent that the course website is the educational environment, instructors and the institution have an ongoing obligation to make that environment appropriate for learning. Schools that have no decorum policies or fail to investigate allegations regarding improper postings of material on a classroom website may find themselves legally responsible for the harassment of one student by another. Typically, schools have detailed anti-harassment policies. These policies will likely apply to the distance learning environment created by the instructor, thus steps should be taken to assure that the distance learning website, course policies and other material are placed within the framework of the anti-harassment and other academic policies of the school.

In addition to the content and its use, the storage of e-mail on servers and back-up tapes may have additional implications. Any message sent by a company, no matter how off-the-cuff, becomes a permanent document that may be shared with far more people than the intended recipient. Under most institutional data policies, e-mail becomes permanently stored in back-up recordings. Those e-mail records are subject to discovery and available for use against the organization in the event of litigation. Because e-mail communications (and all computer back-up files) are corporate records subject to discovery, an institution should incorporate all e-mail backup files in its strategic document storage plan. Further, a business pattern of regularly deleting e-mails may not eliminate totally the legacy of the e-mails or

their contents, if the residual information remains stored on the computer hard drives or back-up systems.²⁶⁰

The final word on e-mail invariably turns on the issue of spam—the mass-distribution of e-mail sent to thousands or millions of e-mail addresses. This technique is strongly disfavored on the Internet by most users, but select ‘calls-to-action’ used by nonprofit organizations are sometimes received favorably. Currently there is no federal legislation banning spam, despite numerous attempts.²⁶¹ Proposed legislation is again being considered by the House of Representatives, but even that legislation reduces, rather than eliminates, the practice.²⁶² Industry leaders have promised to set voluntary industry guidelines to curb the worst practices, but to date no voluntary efforts have had any substantial effect on the practice.²⁶³

Spam is a significant problem for large universities, because of the amount of e-mail traffic it generates. Private schools have the ability to create usage policies that limit the types of communications for which e-mail can be used. These policies filter out a significant portion of spam e-mail. State institutions, however, unlike private schools, have to be solicitous of their students’ rights to receive e-mail, making most policies banning even spam very difficult to create.

E. Additional Burdens Imposed by Terrorism and Anti-Terrorism: The USA Patriot Act

In addition to the privacy and security safeguards already in place in academic settings, the September 11, 2001 terrorist attacks in New York and Washington have resulted in sweeping additional legislation geared to strengthen law enforcement’s hand in collecting information to combat terrorism. The first comprehensive piece of legislation passed in the wake of the terrorist attacks was the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.”²⁶⁴

The USA Patriot Act is a sweeping law empowering law enforcement to extend jurisdiction, increase surveillance and expand the definition of terrorism.²⁶⁵ The law has both specific and general provisions that may effect academic institutions and distance learning environments.²⁶⁶ The USA Patriot Act specifically targets academic institutions by amending the federal

privacy rights held by students to allow an Assistant Attorney General to seek a subpoena or ex parte order to “collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution”²⁶⁷ Once issued, the academic institution has no choice but to comply with the order. The provision also immunizes the institution for compliance with such an order, so long as the academic institution is acting in good faith when carrying out its compliance.²⁶⁸

Most of the provisions of the USA Patriot Act incorporate academic institutions only because they generate many of the communications to which law enforcement is seeking greater access.²⁶⁹ Some of these changes, although loosely tied to terrorism, seem to simply modernize the federal police powers in light of the increased importance of telecommunications and digital communications in the economy and society. For example, section 202 of the USA Patriot Act adds “computer fraud and abuse” to the list of criminal activities for which federal agents may be able to obtain authority to conduct a wiretap.²⁷⁰ Similarly, the law now treats telephone answering messages as documents that can be seized with a warrant, rather than communications for which the more stringent wiretap authority is required.²⁷¹ Under the new amendment, telephone messages are treated in the same manner as faxes, e-mail, and other documents.²⁷²

More troubling to educational institutions are provisions such as section 210, which authorized subpoenas for a much broader range of records, including names, connection records, IP addresses and methods of payment.²⁷³ This gives federal law enforcement much greater ability to track the actual use of phone and Internet systems and may readily involve tracking the use of student activities on university systems, if there is sufficient evidence to establish the grounds for a subpoena.²⁷⁴

Equally problematic for colleges is the greater discretion offered under the law for voluntary disclosure of electronic records.²⁷⁵ The USA Patriot Act has added additional opportunities for institutions to provide information, particularly to law enforcement. Under the Act, an ISP may now voluntarily disclose the content of information:

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property

- of the provider of that service; or
- (6) to a law enforcement agency—
- (A) if the contents—
 - (i) were inadvertently obtained by the service provider; and
 - (ii) appear to pertain to the commission of a crime;
 - (B) if required by section 227 of the Crime Control Act of 1990; or
 - (C) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.²⁷⁶

The impact of this provision is to greatly expand an ISP's discretion to aid law enforcement. The ability to act in the face of potentially serious physical injury seems self-evident. Of course an institution would respond to a bomb on campus. But the statute requires that the response be based on a reasonable belief and the danger be of death or serious physical injury requiring response without delay. Three different determinations or "judgment calls" are required to make the decision to volunteer information. The determination concerning whether divulging information is necessary for "the protection of the rights or property of the provider of that service" is unqualified.²⁷⁷ Thus, an academic institution could theoretically undertake any investigation if a staff member thought that it needed to protect its rights or property. Yet, such an assertion would presumably be based on some objectively reasonable standards.²⁷⁸

In addition, this provision, by its terms, does not automatically abrogate an institution's duties under FERPA. As a result, academic staff members are left with inconsistent federal mandates to both protect student privacy and to affirmatively participate in investigatory processes.²⁷⁹ This inconsistency will tax academic policymakers and lead to inconsistent internal operations at some institutions. According to the Chronicle of Education, "Cornell [University] established [] guidelines because college employees are sometimes too eager to please law-enforcement agents by quickly providing them with the information they seek, or the employees are confused about which college higher-ups to contact for advice ..."²⁸⁰

Despite these problems, educators—particularly those which allow for "student" run classes or allow classes

to participate on aggregator websites without content review—may need to take the potential for criminal or terrorist misuse seriously. A fiction writing course could easily be created and maintained as a front for operating criminal or terrorist activities, with the ready excuse that the postings were merely exercises for class role-playing projects. The tools of distance education—e-mail, bulletin boards, teleconferencing, document sharing and others—are extremely valuable tools for conducting any enterprise. Burying an obscure course among a wide range of offerings might provide the ideal combination of credibility and effectiveness to draw misuse to otherwise well-intentioned educational systems.

The Cornell approach will invariably prove to be the correct first step. Each institution will need to assess its own system and policies, and based on those make a determination regarding the types of incidents that will trigger voluntary disclosure. At a minimum, schools should receive authorization for monitoring all courses to assure academic rigor and quality of instruction. If these reviews trigger additional questions, the policies should provide guidance on what to do next.

The Cornell approach of identifying the individuals empowered to make the determination and setting parameters for decision-making will both build confidence in the institution's privacy policy and serve to establish that a reasonable approach was followed if a disclosure is ever challenged in court. These policies should be developed collaboratively among institutions, but each may have unique priorities that suggests that a national model will take a great deal of time to develop.

Finally, in addition to the various law enforcement powers, the Critical Infrastructures Protection Act of 2001, enacted at section 1016 of the USA Patriot Act, authorizes an expenditure in 2002 of \$20,000,000 for infrastructure study and analysis through the creation of the National Infrastructure Simulation and Analysis Center.²⁸¹ The infrastructure identified includes both physical and virtual components, so some of the key Internet assets located on college campuses throughout the country will be included in this study and support. The newly formed center will require that the academic institutions that have been most active in the development of the Internet and other telecommunications systems submit their historical and operational data.²⁸² The large expenditure, however, may prove a windfall

to academic institutions, to the extent they can provide the necessary research in mapping and improving the virtual infrastructure of data, shaping a more secure, second-generation academic web.

VI. Conclusion

The tension between academic institutions as creators and consumers of intellectual property seems to be most directly felt in the new areas of distance education. Despite the significant opportunities to use new media to expand the reach of the classroom to an ever-growing body of students, concerns regarding copyright, trademark and defamation law continue to limit and dictate what schools attempt to do. These limitations are more directly felt by individual instructors, who must enforce appropriate usage policies for their students, create copyrighted materials and negotiate with their schools over the ownership of the valuable content created.

This Article has merely provided the starting point for the development of a comprehensive policy approach that every school should have to determine what choices and balance are most appropriate for its development of its intellectual property resources and its educational mission. Copyright and trademark management, ownership guidelines, usage policies and protocols on how and when an instructor should intervene by removing a posting or other material submitted by students are all topics that need careful development by every school.

Using the legal and business guidelines in copyright and other laws, each school can begin to tailor a usage and implementation policy that meets the educational and pedagogical goals of the classroom and institution. Because the goals of academic instruction vary from school to school and from class to class, there is no one-size-fits-all solution. Instead, the law provides a framework against which an academically sound policy can be developed.

JELP

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Appendix One: Educational Guidelines for Copyright Usage

To respect the Copyright Act and balance the needs of educators and publishers, the United States Copyright Office has reprinted the following statements regarding the reproduction of copyrighted works at nonprofit educational institutions.

For further information, please see *Copyright Circular 21: Reproduction of Copyrighted Works by Educators and Librarians* as well as the Copyright Act (both are available at <http://www.loc.gov>). The following guidelines are not part of the Copyright Act, but represent statements regarding the meaning of the Act as reprinted in *Circular 21* from the United States Copyright Office.

Guidelines

Reproducing Copyrighted Printed Works for Classroom Use (from Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc.: Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals.)

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request, for his or her scholarly research, or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below; and
- B. Meets the cumulative effect test as defined below; and
- C. Each copy includes a notice of copyright.

Definitions

Brevity:

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words. [Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]
- (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- (iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph “ii” above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

Spontaneity:

- (i) The copying is at the instance and inspiration of the individual teacher, and
- (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.
[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

- (A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
- (B) There shall be no copying of or from works intended to be “consumable” in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- (C) Copying shall not:
 - (1) substitute for the purchase of books, publishers’ reprints or periodicals;
 - (2) be directed by higher authority;
 - (3) be repeated with respect to the same item by the same teacher from term to term.
- (D) No charge shall be made to the student beyond the actual cost of the photocopying.

Educational Uses Of Music

(From the Music Publishers’ Association of the United States, Inc., the National Music Publishers’ Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision.)

A. Permissible Uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.
2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.
3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from

sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations or collective works.
2. Copying of or from works intended to be “consumable” in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
3. Copying for the purpose of performance, except as in A(1) above.
4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.
5. Copying without inclusion of the copyright notice which appears on the printed copy.

Off-Air Recording of Broadcast Programming for Educational Purposes

(From Congressman Robert Kastenmeier, House Report on Piracy and Counterfeiting Amendments.)

The purpose of establishing these guidelines is to provide standards for both owners and users of copyrighted television programs.

(1) The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.

(2) A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable transmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. “Broadcast programs” are television programs transmitted by television stations for reception by the general public without charge.

(3) Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. “School days” are school session days—not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions—within the forty-five (45) calendar day retention period.

(4) Off-air recordings may be made only at the request of, and used by, individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

(5) A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

(6) After the first ten (10) consecutive school days, off-air recording may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

(7) Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

(8) All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

(9) Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

In general, the purpose of the guidelines listed above is to state the minimum and not the maximum standards of educational fair use under section 107 of the Copyright Act.

Appendix Two: Sample Syllabus Provisions on Copyright Usage

Examinations, Grading and Written Submissions:

Each student will receive a cumulative grade for the course. Course grades will be based on a series of written projects and short exams assigned during the semester, as well as classroom participation. The written projects may be made available for publication, either using the Internet or in print. By enrolling in the course, you are agreeing to give perpetual, non-exclusive permission to reprint your submitted work as well as to allow for editing of that work to allow it to conform to stylistic, length or other needs. (For example, the written materials may appear as a resource page prepared by us on behalf of the Boston Volunteer Lawyers for the Arts or on the Pierce Law IP Mall.)¹

Use of Classroom Website:²

A. Use of the Classroom Website:

The classroom website (Website) is a graphical bulletin board on the World Wide Web that provides references and resources for this course. This syllabus, current reading assignments, Internet resources, law review articles and cases available on the Website can be linked to the e-mail postings you place on the Website using an open discussion forum. Many of the course handouts and materials will be made available through the Website. To use it, you must agree to abide by the user agreement at each site and the requirements set out in this syllabus.

B. Protocol and Decorum

Messages sent to the Website are automatically made available to everyone who visits the Website. The list is monitored but not moderated. This means any message you send to the list will be immediately available for all list members without human intervention. I will read the list and participate in discussions from time to time, but the list is designed to be your vehicle to explore some of the ideas first addressed in class.

The list is an extension of the classroom. As such, the decorum and professionalism expected of you in class extends to all postings made to the list. I expect that you will extend the same courtesy to your fellow students on the list as you do in class. Feel free to disagree with the ideas expressed, but work to keep the discussions polite and focused on the ideas. Please consult the student handbook or honor code for any questions on classroom decorum.

C. Attribution of Postings

Always include your name and e-mail address in the body of your message so that others may reply to you directly. Personal messages should be sent directly rather than to the list as a whole. Please do not send your e-mail anonymously. I believe that this discourages both thoughtfulness and professionalism.³

If you have a question or other item that you would like posted without attribution, send the message to me directly and I will forward it to the list if appropriate. If you send e-mails directly to me or ask questions that are of general interest, I will also edit those questions (and my response when applicable) and forward them to the class.

D. Protection of Copyright

The [college], its students and its faculty are all required to abide by copyright law. This is both as a matter of law and law school policy. Please respect this. The Website provides an excellent vehicle for sharing information, particularly information gleaned from other electronic resources (such as the Internet, Lexis or Westlaw). While this is an appropriate use of the Website, please be very conservative with respect to the amount of material that is reproduced in the e-mail. When possible, please post cites rather than significant portions of text from any source. A fair use defense to copying should be used sparingly, if ever.⁴

¹ Jon M. Garon, *Law of Motion Picture and the Performing Arts*, adopted Spring 2002.

² Jon M. Garon, *Copyright Law Syllabus*, adopted Fall 2001.

³ This policy is strongly debated among academics. Many instructors feel that anonymous postings allow for more open communications and more honest responses. Given the particular subject matter, such unbridled responsiveness may be appropriate. The sample policy reflects my belief that any benefits are outweighed by the potential for irresponsible statements that can come from anonymous postings. It might be worth noting that the software used for this class does not require students to post their name and e-mail, so it is only the academic policy, not software, that requires their adherence to the policy. As such, a student could choose to disregard my policy and post to the class anonymously.

⁴ This policy is based on the use of the Lexis Virtual Classroom. As such, all students are subscribers to Lexis, and Lexis grants permission to post any materials in its database to any of its course Websites.

Notes

1. JOHN DEWEY, *EXPERIENCE AND EDUCATION* 77 (1938). See *infra* note 40 and accompanying text.
2. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW* act 1, sc. 2, l. 159 (David Bevington ed., Longman) (1997).
3. See Bruce V. Bigelow, *UCSD in Pact With Venture Capital Firm*, SAN DIEGO UNION-TRIB., Oct. 26, 2001, at C1. See also Suzanne LaPlante, *Facilitating Technology Transfer: Computer Software Development and Cooperative Research and Development Agreements*, 1 SYRACUSE J. LEGIS. & POL. 123 (1995).
4. See Promotion of Distance Education Through Digital Technologies Federal Register Notice, 63 Fed. Reg. 71,167 (Dec. 23, 1998); U.S. Copyright Office, *Copyright Office Study on Distance Education*, at <http://www.loc.gov/copyright/disted/> (last visited Mar. 14, 2002); John C. Vaughn, *Statement of the Association of American Universities, American Council on Education, National Association of State Universities and Land-Grant Colleges Concerning Promotion of Distance Education Through Digital Technologies*, at <http://www.loc.gov/copyright/disted/comments.html> (Feb. 5, 1999) (“While licensing is now and will continue to be an important means of defining the terms for use of copyrighted works, licensing cannot substitute for the need for a distance education exemption for display and performance of works, both for economic reasons and reasons of principle.”).
5. 17 U.S.C.A. § 101 (West 2002).
6. 15 U.S.C.A. § 1051.
7. 17 U.S.C.A. § 102. Unpublished expression was protected by state law rather than federal law prior to the enactment of the current Copyright Act on Jan. 1, 1978. As a result, works derived from materials created but not published prior to Jan. 1, 1978 may be subject to different provisions of the Copyright Act.
8. See, e.g., eSylvan, at <http://www.esylvan.com> (last visited Mar. 15, 2002); ClassBuilder, at <http://www.classbuilder.com> (last visited Mar. 15, 2002); The Center for Computer-Assisted Legal Instruction, at <http://www.CALI.org> (last visited Mar. 15, 2002).
9. See, e.g., Blackboard.com, at <http://www.blackboard.com> (last visited Mar. 15, 2002); WebCT, at <http://www.webct.com/> (last visited Mar. 15, 2002).
10. See, e.g., Fathom Knowledge Network, at <http://www.fathom.com> (last visited Mar. 15, 2002) (the members of this consortium include American Film Institute, The British Library, The British Museum, Cambridge University Press, Columbia University, London School of Economics, Natural History Museum, New York Public Library, RAND, Science Museum, University of Chicago, University of Michigan, Victoria & Albert Museum, Woods Hole Oceanographic Institution); Western Governors University, at <http://www.wgu.edu/wgu/about/> (last visited Mar. 15, 2002).
11. Carlos Gieseken, *Learning; E-classes Click as Options Grow*, BOSTON HERALD MAG., Dec. 2, 2001, at M3.
12. Sarah Parkin, *Adults Tap Into Web for College Big Time*, ARIZ. REPUBLIC, Dec. 13, 2000, at 8.
13. Randy Myers, *The Absent Professors*, CFO, THE MAG. FOR SENIOR FIN. EXECUTIVES, Dec. 22, 2000, at 63. See also Steve Hamm, *The Wired Campus*, BUS. WK., Dec. 11, 2000, at 102.
14. Sarah Murray, *Companies Look Inwards: Business Schools and Corporate Universities: Teaching is Increasingly Being Brought In-House by Companies, Frequently in Partnership With Business Schools*, FIN. TIMES (London), Dec. 3, 2001, at 2.
15. Maria Atanasov, *Savings, Convenience a Draw for E-Learners; Online Classrooms Fit Nicely Into the Busy Lives of Workers and Students Hard-Pressed to Find the Time to Learn New Skills or Update Old Ones*, CHI. TRIB., Dec. 17, 2001, at B1.
16. Christopher Shea, *Taking Classes to the Masses; Big-Name Universities Like Columbia Jumped Into the Online Race Fearing to be Left Behind; Now Many are Slowing Down*, WASH. POST MAG., Sept. 16, 2001, at W25.
17. Charlene L. Smith, *Distance Education: A Value-Added Model*, 12 ALB. L.J. SCI. & TECH. 177, 185 (2001) (“[I]t takes three to five times longer to develop a distance learning class than a regular class.”).

18. HIGHER EDUCATION PROGRAM AND POLICY COUNCIL OF THE AMERICAN FEDERATION OF TEACHERS, GUIDELINES FOR GOOD PRACTICE 11 (2000) (hereinafter GOOD PRACTICE GUIDELINES) (“[t]he 1999 report of the University of Illinois Faculty Seminar on Distance Education recommended smaller faculty-student ratios in distance education because there is so much information to be monitored. Most of the practitioners we consulted, however, did not endorse such a hard-and-fast rule.”).

19. Jennifer Medina, *Despite School Closing, Online Colleges Beckon: Cyberspace Market Expected To Grow*, BOSTON GLOBE, Aug. 5, 2001, at B9. See also Ellen McCarthy, *Online Education Becomes Tech Success Story for D.C. Area*, WASH. POST, Feb. 12, 2002, at E5 (“Blackboard Inc. . . . said it posted \$ 15 million in sales during the third quarter of 2001 and expects to become profitable this year.”).

20. *Id.*

21. See eCollege, at <http://www.ecollege.com/> (last visited Mar. 15, 2002); Peterson’s, at <http://petersons.com/> (last visited Mar. 15, 2002). Peterson’s has an affiliation agreement with E-College, so much of its information comes from E-College itself.

22. Christopher Shea, *supra* note 16, at W25.

23. Marybeth Peters, U.S. Copyright Office, *Report on Copyright and Digital Distance Education*, at 12 (May 1999), at http://www.loc.gov/copyright/docs/de_rpt.pdf [hereinafter *Register’s Report*]. “Community colleges, with their history of serving local and continuing education communities, have been particularly active, as have many university systems.” *Id.*

24. Brook K. Baker, *Beyond Macerate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 289 (1994). See also Victor M. Goode, *There is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223 (2000).

25. Cf. Donald MacLeod, *Higher Education: e for East End: Donald MacLeod Finds a Global Consortium Offering London History as One of its Short Courses Online*, GUARDIAN (London), Feb. 19, 2002, at 15 (“short courses

are a response to a lack of demand for long degree courses. Last week’s signing of the British Museum to the Fathom consortium is in line with this strategy, allowing users to explore exhibitions such as the current Agatha Christie and archaeology.”).

26. Jennifer Medina, *supra* note 19, at B9.

27. Digital education creates an opportunity for a visionary, structural shift in education.

A learning infrastructure based on digital technology offers more than just education as usual on the Internet. It offers a set of extraordinary new tools: self-paced, multimedia modules that deliver leading pedagogy; in-depth outcome assessments; and online interaction with fellow students and teachers that facilitates continuous feedback and improvement.

Robert C. Heterick, Jr. et al., *The Public Policy Implications of a Global Learning Infrastructure, A Report from a Joint NLII-SHEEO Symposium*, pt. I (1997), at <http://www.educause.edu/nlii/keydocs/policy.html> [hereinafter *Policy Implications*].

28. *Register’s Report*, *supra* note 23, at iv.

29. See GOOD PRACTICE GUIDELINES, *supra* note 18, at 18 (questionnaire of current distance teaching instructions continues to include responses for telecourses, interactive television, one-way television, and other non-digital formats, along with a growing number of Internet-based delivery systems).

30. *Register’s Report*, *supra* note 23, at 9.

31. *Id.*

32. *Id.*

33. While it remains axiomatic that the Internet has not started distance learning, the importance of radio, cassette tapes and television to distance learning should not be lost to the novelty of the Internet.

34. Different educators and technology providers focus

on a widely divergent group of techniques and outcomes. *Policy Implications*, *supra* note 27.

35. J. Caviedes, *A Technological Perspective of Anytime, Anywhere Education*, 2 ALN MAG. 1 (March 1998), available at http://www.aln.org/alnweb/magazine/vol2_issue1/jorge.htm.

36. Another subset of the tools focuses on the categories of software and capabilities available. Caviedes identifies the following groups of technologies and tools:

1. Multimedia authoring tools for both CD-ROM and web (well over 100 available).
2. Presentation tools and word processing tools.
3. Virtual reality languages and environments (e.g., AlphaWorld and VRML).
4. Hypermedia languages and browsers.
5. Interactivity-enabling web programming (e.g., Java).
6. Course structuring tools.
7. Search engines and data mining.
8. Storage and retrieval.
9. Digital watermarking.

Policy Implications, *supra* note 27, at pt. II.

37. Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463 (2001); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347 (2001).

38. Sharon Smaldino, *Instructional Design for Distance Education*, READINGS IN DISTANCE EDUC. 19, at <http://www.fcae.nova.edu/pet/simonson/monograph.PDF> (last visited Feb. 19, 2002).

39. Caviedes, *supra* note 35, at n.17 (citing L. K. Stemler, *Educational Characteristics of Multimedia: A Literature Review*, 6 J. OF ED. MULTIMEDIA AND HYPERMEDIA 339, 339-59 (1997)).

40. For a list of degrees, including a law degree from Concord University School of Law, masters megrees from

Penn State or the University of Phoenix, and a variety of other degrees including, certificates, bachelor degrees, masters and doctorates, see CareerUniversities.com, at <http://www.careeruniversities.com/> (last visited Mar. 16, 2002).

41. See DEWEY, *supra* note 1, at 77-112.

42. Cf. Leslie T. Thornton, *Beyond the Blackboard: Regulating Distance Learning in Higher Education*, 3 VAND. J. ENT. L. & PRAC. 210, 216 (Spring 2001) (contrasting student levels of online interaction with anecdotal evidence of passive participation in live lectures).

43. See, e.g., University of Phoenix, at http://www.onl.uophx.edu/who_attends.html (last visited Mar. 16, 2002).

44. See generally LEGAL ISSUES & EDUCATION TECHNOLOGY: A SCHOOL LEADER'S GUIDE (Edwin Dardin ed., 2001), available at <http://www.nsba.org/cosa/pubsem>.

45. Several of the distance education services are described to better frame their use before identification of the legal issues involved in creating and protecting the content of these sites.

1. Resource Centers. One of the proven successes at Franklin Pierce Law Center is the "Intellectual Property Mall," an online resource of topical materials for students, scholars and practitioners. See Franklin Pierce Law Center, at <http://www.IPMall.piercelaw.edu> (last visited Mar. 16, 2002). The Intellectual Property Mall has become a premiere outreach tool for the school, promoting faculty, providing a tangible service to the public and creating a top-quality point of contact for the press and public with Pierce Law. A topical Internet resource center promotes continuing use of the school's resources, and serves as a positive promotional tool for educational enterprises. Essentially, the resource center provides what the university library of the last century provided—a place of trusted, stored knowledge for the community.

2. Student Showcase. The Internet's low cost of content distribution provides an excellent way for the institution to promote the success of its students with family, alumni and the general community. Activities can range from online galleries for visual arts, film and music, to writing

competitions and posted academic writings.

3. **Increased Course Offerings.** Distance education creates an opportunity for institutions to allow students to attend selected courses at other institutions, potentially expanding the range of subjects available to them. For specialized courses, the ability to aggregate students across multiple campuses (or even schools) may be the only way to guarantee that the course can be offered on a regular, fiscally sound basis.

4. **Modularized Content.** Within a traditional course, some subject components are appropriate for the student to self-teach, while others require significant classroom interaction. Online, interactive software can provide students with the appropriate instructional materials, and evaluation software can measure the competence of the student in those materials. Properly designed, the instructional materials can be provided selectively in response to the scores each student receives on the evaluations, so the readings and assignments are appropriate to the knowledge of the student.

5. **Online Courses.** Using chatrooms, asynchronous bulletin boards and the other tools listed above, an online course can range from providing a fully self-directed environment to a fully interactive environment as the instructor deems appropriate.

6. **Student Portal.** Portals centralize many of the functions described above into a single interface, customizable by the user. The user can customize his or her welcome screen to reflect the course information for which that student is enrolled, the activities in which that student is interested and the Resource Center content (as well as third party content) of interest. Portals function to centralize and simplify content delivery to the user. For students, portals allow a student to log into the university computer system, read e-mail, retrieve course announcements, read posted class materials, view campus activities and view any news, entertainment or other content services from that student's log-on page. For alumni and subscribers, the school can choose to become the home portal for news and information regarding the subscriber's areas of interest. Campus and faculty activities can be highlighted, and substantive news, placement opportunities for students, and other resources can be centralized. Discussion boards could be available by class and by area of interest or geographic location. In this

way, the school's support community would expand.

46. 17 U.S.C.A § 102 (West 2002).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* § 106.

51. *Id.* § 106A.

52. *Id.* § 302(a).

53. *Id.* § 302(c).

54. *Id.*

55. This date has been fixed by the Sonny Bono Term Extension Act, which extended the copyright of all existing copyrighted works by a twenty-year extension. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The application is simple: "Under the new statute, any work that would otherwise have fallen into the public domain on December 21, 1998, will now continue to have copyright protection until 2018." Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L. J.* 491, 522-23 (1999).

56. GORMAN & GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 358-59 (5th ed. 1999).

57. *Id.* Technically those works have two terms—an initial term of 28 years and a second term of 67 years. For works published during this period, the renewal of the copyright and the vesting of the second term occurs automatically, so that no divestiture can occur. 17 U.S.C.A. § 304 (West 2002). The choice to renew the copyright voluntarily rather than by operation of law will affect the rights of the copyright owners and transferees in those rights. *Id.*

58. 17 U.S.C. § 304 (1994) (superceded by Pub. L. No. 102-307 § 102(g)(2)). See U.S. Copyright Office, *Copyright Circular 15a: Duration of Copyright: Provisions of the*

Law Dealing With the Length of Copyright Protection, at <http://www.loc.gov/copyright/circs/> (last visited Mar. 16, 2002).

59. See U.S. Copyright Office, *Copyright Circular 22: How to Investigate the Copyright Status of a Work*, at <http://www.loc.gov/copyright/circs/> (last visited Mar. 16, 2002).

60. 17 U.S.C.A. § 401(b) (West 2002).

61. *Id.* § 401(c). The legal requirement is that the “manner and location [provide] reasonable notice of the claim of copyright.” *Id.*

62. *Id.* § 408. See also U.S. Copyright Office, *Copyright Circular 4: Copyright Office Fees*, at <http://www.loc.gov/copyright/circs/> (last visited Mar. 16, 2002). The present fee schedule is under review and should be expected to be increased under the Copyright Office rate setting procedures.

63. § 410(c).

64. *Id.* § 412.

65. GORMAN & GINSBURG, *supra* note 55, at 384.

66. *Id.*

67. § 407.

68. *Id.*

69. *Id.* § 407(d).

70. *Id.* § 201(a).

71. *Id.* § 201(b).

72. The assignment of authorship is distinct from the assignment of the copyright. Any author may transfer his or her copyright at any time, but the assignment of copyright will be a narrower grant than the assignment of authorship, because the author retains certain rights to termination of a copyright assignment that are extinguished if the work is made pursuant to a work for hire relationship. See *id.* § 203.

73. See *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 556-57 (9th Cir. 1990), *cert. denied sub nom.*, *Danforth v. Cohen*, 498 U.S. 1103 (1991). Although the Ninth Circuit applied the absolute requirement of the writing to § 204 transfers, the writing obligation for specially commissioned work is even more stringent in that it requires the execution by both parties to the agreement.

74. § 101.

75. See also Roberta R. Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 *COMPUTER & HIGH TECH L.J.* 1, 13 (2001); Gregory K. Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 *B.C. L. REV.* 549 (2002).

76. § 201 (b).

77. See *Hi-Tech Video Prods. v. Capital Cities*, 58 F.3d 1093, 1097 (6th Cir. 1995), *rehearing denied*, 1995 U.S. App. LEXIS 21039 (1995) (“In virtually every case, a strong indication of a worker’s employment status can be garnered through examining how the employer compensates the worker (including benefits provided) and how the employer treats the worker for tax purposes.”); *Aymes v. Bonelli*, 980 F.2d 857, 863 (2d Cir. 1992) (“The importance of [the tax treatment and employee benefits] factors is underscored by the fact that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”).

78. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). These factors include (i) the skill required; (ii) the source of the instrumentalities and tools; (iii) the location of the work; (iv) the duration of the relationship between the parties; (v) whether the hiring party has the right to assign additional projects to the hired party; (vi) the extent of the hired party’s discretion over when and how long to work; (vii) the method of payment; (viii) the hired party’s role in hiring and paying assistants; (ix) whether the work is part of the regular business of the hiring party; (x) whether the hiring party is in business; (xi) the provision of employee benefits; and (xii) the tax treatment of the hired party. See also *RESTATEMENT (SECOND) OF AGENCY* § 220(2)

(1957) (setting forth a non-exhaustive list of factors, none of which are determinative, relevant to determining whether a hired party is an employee).

79. See Laughlin, *supra* note 75, at 569-71.

80. See discussion *infra* at II.F.

81. § 101.

82. See Rochelle C. Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1187-88 (2000); Kwall, *supra* note 75, at 15; Laughlin, *supra* note 75, at 575.

83. Laughlin, *supra* note 75, at 573-74.

84. *Vanderhurst v. Colorado Mt. College Dist.*, 16 F. Supp.2d 1297, 1307 (D. Colo. 1998).

85. *Id.*

86. The issue was also addressed under state law in *Williams v. Weisser*, 78 Cal. Rptr. 542, 546 (Cal. Ct. App. 1969). Reliance on this case is misplaced for a variety of reasons. First, the subject matter was oral lectures which were protected by state law, not federal copyright law. *Id.* Second, UCLA, the university employing the plaintiff, stated in a letter to the faculty that

regarding the faculty member's right to control distribution of notes taken in classroom lecture, it appears quite clear that under California's recognition of common law copyright, the lecturer retains a property right to his words spoken before a limited audience. Any unauthorized duplication and distribution of these words, either verbatim or in the form of notes may therefore constitute an infringement of this right.

Id. at 544. More than failing to assert any claims to their faculty's lectures, UCLA had adopted the common law of copyright as its position. *Id.* Third, UCLA never claimed any interest in this instance, so the record before the court could not support any contention by UCLA that it had any claims—regardless of the materials sought. *Id.* Even under

California law in 1969, nothing in the case suggests that UCLA was not the copyright holder of handouts, examinations and other written materials prepared for college students and distributed by the faculty. While this is an open question, the case hardly provides any basis for a contrary determination.

87. See generally 17 U.S.C.A. §102(a) (West 2002).

88. See Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L. J. 165, 182 (2000).

89. Ernest Boyer, SCHOLARSHIP RECONSIDERED 28 (1990) (“[At]t most four-year institutions, the requirements of tenure and promotion continue to focus heavily on research and on articles published in journals, especially those that are refereed ...”).

90. *Id.* at 50. The author suggests that to stop the oppression the over-emphasis on scholarship has caused on many college campuses, so-called “creativity contracts” be used that allow the individual faculty member to negotiate with the employer for the specific types of scholarship, writing and service activities that professor will perform. *Id.* The creativity contract assumes that all scholarship is for the institution such that it can be bargained against other services the institution values from the faculty member. *Id.*

91. Arguably, these scholarship requirements are enforced despite the need to provide students instruction. See *id.* at 29.

92. *Weinstein v. University of Illinois*, 811 F.2d 1091, 1093-95 (7th Cir. 1987); *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416-17 (7th Cir. 1988) (“We might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.”).

93. *Hays*, 847 F.2d at 416.

94. *Id.*

95. BOYER, *supra* note 89, at 29.

96. Of course, the only writings on the subject are by

the faculty members who would risk losing the independence of their writings. While I recognize that the law is on the side of the universities, I strongly believe that the authorship of academic writings should not be transferred to the employer institution. As a faculty author, my primary goal is to promote the non-economic interests in my writings—greater dissemination (often free of charge) and control over the attribution and integrity of my writings. While critically important to me as an academic, neither of these interests are protected or recognized by copyright law, except in limited circumstances. *Cf.* Dreyfus, *supra* note 82, at 1200.

97. *See* Weinstein, 811 F.2d at 1094; *see also* Manning v. Board of Trustees, 109 F. Supp.2d 976, 980-81 (C.D. IL 2000).

98. 17 U.S.C.A. § 201(b) (West 2002). The technical language of the statute suggests that the manner of adoption of the collective bargaining agreement or copyright use policy should provide for a signed writing by the institution and each faculty member. While this may be incorporated by reference into other signed documents, publication of an unsigned policy promulgated by a university that was not signed upon acceptance by the faculty members may be insufficient and will not fully comport with the writing requirements.

99. *Id.* § 101.

100. Thomson v. Larsen, 147 F.3d 195, 200 (2d Cir. 1998); Childress v. Taylor, 945 F.2d 500, 508-09 (2d Cir. 1991).

101. *See* Shira Perlmutter, *Convergence and the Future of Copyright*, 24 COLUM.-VLA J.L. & ARTS 163, 172-73 (2001) (“The reason for the ‘bundle’ of rights is the historical accretion of responses to new uses and new technologies (beginning with the right to make copies impelled by the invention of the printing press).”).

102. MELVILLE & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 10.02A, at 10-20 (1978) [hereinafter NIMMER].

103. *Id.* *See also* § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified in section 106, may be transferred ... and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the

protection and remedies accorded to the copyright owner by this title.”).

104. NIMMER at § 10.02A.

105. § 204(a).

106. *See* Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984).

107. Effects Assoc., Inc. v. Cohen, 908 F.2d 555, 557-58 (9th Cir. 1990), *cert. denied sub nom.*, Danforth v. Cohen, 498 U.S. 1103 (1991).

108. *See id.*

109. § 201(d).

110. *See* Appendix Two for an example of my non-exclusive license of copyright provision.

111. For most purposes, a grant such as this would cover the use: “By enrolling in the course, you are agreeing to give perpetual, non-exclusive permission to reprint your submitted work as well as to allow for editing of that work to allow it to conform to stylistic, length or other needs.” In other situations, however, such as students who are contributing to a larger work or who are creating materials that may be the source of other students’ derivative works, the license would need to be broader.

112. Grant M. Hayden, “*The University Works Because we do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233 (2001).

113. Although states and the instrumentalities of states, such as state universities, may be immune from damages under recent Supreme Court holdings, this should not be used as the basis for institutional planning because such a position is intellectually dishonest and legally too unstable to guarantee immunity from suit. The Supreme Court has recently decided a string of cases that strip copyright holders of their ability to sue states for copyright violations as a result of Eleventh Amendment protection provided to the states by the Constitution. *Rodriguez v. Texas Comm’n on the Arts*, 199 F.3d 279, 281 (5th Cir. 2000). *See* Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Savings Bank, 527

U.S. 627, 634 (1999) (denying protection for patent infringements from states or state instrumentalities); *Seminole Tribe v. Florida*, 517 U.S. 44, 55-56 (1996) (prohibiting Congress from abrogating state immunity). The traditional construction of the Eleventh Amendment, however, allows prospective equitable or injunctive relief. *Ex parte Young*, 209 U.S. 123, 149-50 (1908). This has not yet been overturned. Also, the situation remains in flux, and Congress has proposed an amendment to the Copyright Act to help remedy the Court's decisions. The Intellectual Property Protection Restoration Act of 2001 was submitted simultaneously in both houses of Congress. *See* H.R. 3204, 107th Cong. (2001), S. 1611, 107th Cong. (2001) (providing states an opportunity to voluntarily waive immunity or face heightened liability under a provision enacted under the Fourteenth Amendment).

114. Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CALIF. L. REV. 513, 518 (1992) ("Academia takes plagiarism seriously: 'Plagiarism is an academic capital offense, punishable by academic death for student or faculty.'") (quoting K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 39 (1988)).

115. *Id.* at 516-17 ("Plagiarism means intentionally taking the literary property of another without attribution and passing it off as one's own, having failed to add anything of value to the copied material and having reaped from its use an unearned benefit.").

116. Neil MacCormick, *Institutional Normative Order: A Conception Of Law*, 82 CORNELL L. REV. 1051, 1055 (1997) ("The dichotomy between wrong and not-wrong (or between wrong and right-in-the-sense-of-not-wrong) is the fundamental differentiation of actions or of intended or planned acts in a normative order. What a person engages upon when aiming to make normative order actual, is the task of, or commitment to, avoiding wrongdoing.").

117. *Id.* at 1056.

118. *See, e.g.*, Comment of Association of American Publishers, Promotion of Distance Education Through Digital Technologies, 63 Fed. Reg. 71,167, Feb. 5, 1999, at 2, available at <http://www.loc.gov/copyright/disted/comments/INIT004.PDF> ("The essential principle of 'licensing' rights, which is critical to the practical exercise of copyright ownership as well as the satisfaction of user needs in a diverse

and competitive marketplace, works well for producers and users in this marketplace and has been contemporaneously reaffirmed by the courts as a legitimate exercise of copyright.").

119. *See id.* at 3 ("To be effective, licenses must encompass the breadth of needs of the academic course and be delivered or confirmed in a timely fashion; this has not always been the case. Also, the problem of identification of copyright holders remains an issue for many institutions.") (comment of Consortium of College and University Media Centers).

120. *See, e.g.*, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

121. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

122. 17 U.S.C.A. § 107 (1996).

123. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985) ("Fair use was traditionally defined as 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'") (quoting H. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

124. *See* H.R. REP. NO. 94-1476, at 65-66 (1976).

125. *See id.*

126. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (internal quotation marks and citation omitted).

127. *See Harper & Row*, 471 U.S. at 550-51 (discussing defense as it applied to unpublished works before and after the 1976 Copyright Act).

128. By way of anecdotal example, at a recent conference where I spoke on issues of faculty ownership of content and copyright, another of the speakers later demonstrated his highly effective chemistry website. Although all of his scientific work was original to him, he used thousands of images culled from various magazines to illustrate his

webpages. He would never dream to have plagiarized another professor's research even as he took pride in the quality of his unauthorized reproductions. (The name of the institution is omitted, although I did speak with legal counsel for the institution.)

129. See 17 U.S.C.A. § 107(1) (West 2002) (the purpose of the copying may be public distribution rather than the more modest distribution to students engaged in academic activities).

130. Posting a copyrighted work to a website would comprise a reproduction, distribution and display of the work. *Id.* § 106.

131. *Id.* § 107.

132. *Harper & Row*, 471 U.S. at 562 ("The crux of the profit/nonprofit business distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

133. See *id.* This suggestion is not a legal presumption and may be factually overshadowed. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-78 (1994) (commercial nature of the use not dispositive because of the transformative use to which the parody song was put). See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (recording entire copyrighted television shows may be fair use under the Copyright Act); *Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (non-commercial use by a consumer to record music exempt from copyright liability, illustrating the fair use of such recording).

134. *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1176 (E.D. Ill. 1997) (finding that the use of unlicensed clip art was not fair use). The court described the organization's website thusly:

It is also undisputed that [the organization] uses its Web Page for the commercial purposes of promoting the association (whose members pay dues) and generating advertising revenue. The clip art files enhanced the Web Page and furthered these commercial purposes; they

were clearly not placed on the Web Page for the purposes of criticism, comment, news reporting, teaching, scholarship, or research.

Id. at 1175.

135. See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).

136. See *id.* at 1536-37.

137. See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996); *Dushkin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991). See also *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352-53 (S.D.N.Y. 2000).

138. As a practical matter, faculty members have also learned that some students will invariably print every page, resulting in printing fees that may be quite higher than the fees incurred if a course pack or textbook was assigned.

139. See *infra* note 214 regarding potential liability for linking.

140. Cf. *Sony Computer Entm't Am., Inc. v. Bleem*, 214 F.3d 1022 (9th Cir. 2000) (unauthorized use of screen shot from personal video game); *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp.2d 688, 695-96 (D. Md. 2001) (allowing users to upload or download images without consent of the images' originators); *Marobie-FL, Inc.*, 983 F. Supp. 1167, 1176-79 (N.D. Ill. 1997) (involving dispute as to whether the transmission of requested information in electronic form through the RAM of a computer constituted copying); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 552-53 (N.D. Texas 1997) (electronically reproducing, distributing and displaying protected images via download).

141. *Id.*

142. See *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 2002 U.S. App. LEXIS 1786, at *17 n.29 (9th Cir. 2002) (holding that the inline linking of full-sized images from the website of a third party constituted infringing display of those images).

143. See H.R. REP. NO. 1476, at 68 (1976) (the guidelines

were incorporated into the legislative history of the 1976 Copyright Act). *See also* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1535 (S.D.N.Y. 1991).

144. *See* H.R. REP. NO. 1476, at 68 (1976). The guideline is part of a series available through the Copyright Office. *See also* U.S. Copyright Office, *Copyright Circular 21: Reproductions of Copyrighted Works by Educators and Librarians*, at <http://www.loc.gov/copyright/circs/> (last visited Mar. 16, 2002) [hereinafter *Copyright Circular 21*].

145. *Basic Books, Inc.*, 758 F. Supp. at 1536; H.R. REP. NO. 1476, at 68.

146. *Basic Books, Inc.*, 758 F. Supp. at 1536.

147. *See id.*; H.R. REP. NO. 1476, at 68.

148. Among law schools, Western State University College of Law in Fullerton, California represents the only for-profit law school approved by the American Bar Association. It is, however, presently only provisionally approved. Thomas Jefferson School of Law had been the first such law school to receive provisional American Bar Association approval. (Thomas Jefferson had formerly been a separately accredited branch of Western State and has since reorganized as nonprofit, educational institution.) Western State is wholly owned by Argosy University. Concord School of Law, the only online law school, has not yet received accreditation by either the State Bar of California or the American Bar Association.

149. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (“[C]ommercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”). *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576-78 (1994) (stressing that the presumption of unfairness from *Sony* remains only one of the factors to be balanced in fair use, and it may be overcome if the usage is transformative).

150. *Basic Books, Inc.*, 758 F. Supp. at 1530-31.

151. The Classroom Guidelines were adopted well before website uses were contemplated. The copying provision, however, remains applicable. “Multiple copies (not to exceed

in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion.” *See Copyright Circular 21, supra* note 144, at 8. If the website is open to the public rather than limited to the students, however, the potential exists for many more copies to be reproduced and distributed than is permitted under the Guidelines.

152. *See* Appendix Two.

153. The preamble to § 106 provides that the rights enumerated are “subject to sections 107 through 121,” which embody most of the limitations on the exclusive rights of the copyright holder. 17 U.S.C.A. § 106 (West 2002). In addition, there are other miscellaneous provisions that limit the copyright holder’s ability to bring a copyright action, such as § 1008, which eliminates the infringement action for non-commercial recording of music. § 1008.

154. § 110(1).

155. *Id.* *See* H.R. REP. NO. 1476, at 85-86. The statute distinguishes between the ability to perform the works and the ability to transmit the works, which is subject to § 110(2). The National School Board Association Guide states that “devices for amplifying sound and for projecting visual images” fall within § 110(1) which is consistent with the public performance rights, so long as the sound or image is not transmitted to another location. *See DARDEN, supra* note 45, at 75.

156. § 110(1).

157. A related section provides for nonprofit public performances of nondramatic literary or musical works performed for charitable purposes. This provision essentially exempts schools, churches and other organizations from paying royalties on school concerts and similar activities. *See id.* § 110(4). This section allows permission to perform the music or readings so long as the copyright owner does not object and either there is no admission charge or the profits are dedicated to the tax-exempt activities of the organization. *Id.*

158. The copying into PowerPoint may still be fair use under § 107.

159. § 110(2).
160. See Marybeth Peters, Reg. of Copyrights, Testimony Before the Sen. Comm. on the Judiciary on S. 487, 107th Congress 1st Session, Mar. 13, 2001 (presenting the views of the Copyright Office on the “Technology, Education, and Copyright Harmonization Act”), at <http://www.lcweb.loc.gov/copyright/docs/regstat031301.html>.
161. See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 403, 112 Stat. 2860, 2889 (1998).
162. *Id.*
163. See *Register’s Report*, *supra* note 23, at 7.
164. *Id.*
165. Twenty-First Century Distance Learning Enhancement Act, H.R. 2100, 107th Cong. (2001).
166. *Id.*
167. *Id.*
168. *Id.*
169. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).
170. *Id.* at 261.
171. *Id.* Cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“Vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individually accountable for the actions of another.”).
172. *Fonovisa, Inc.*, 76 F. 3d. at 262.
173. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).
174. See *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022-24 (9th Cir. 2001).
175. *Id.* at 1024.
176. *Napster, Inc.*, 239 F.3d at 1020; *Fonovisa, Inc.*, 76 F.3d at 264.
177. *Napster, Inc.*, 239 F.3d at 1020; *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995) (“whether Netcom knew or should have known of” infringement); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 n. 29 (11th Cir. 1990).
178. *Napster, Inc.*, 239 F.3d at 1019.
179. 17 U.S.C.A. § 512 (West Supp. 2002).
180. *Id.* § 512(k) (The term service provider is defined as “a provider of online services or network access, or the operator of facilities therefore” along with certain additional activities related to the telecommunications components described in § 512(a)).
181. *Id.* § 512(a)-(b), (k).
182. *Id.* § 512(c).
183. *Id.* § 512(c)(1).
184. *Id.* § 512(c)(2).
185. *Id.* § 512(g).
186. Such a policy may be limited for a state institution which must also comport its take-down and access policies with its obligations under the First Amendment. A state institution may be obligated to allow a user to comply with the counter-notification provisions of § 512(g) and limited in the futher action it can take against the content of the speaker.
187. *Id.* § 512(e).
188. *Id.* § 512(e)(1)(a).
189. *Id.* § 512(b)-(c), (e).
190. See Panel Discussion, *The First Amendment in*

Cyberspace: Use of the Internet in the College Community, 17 N. ILL. U. L. REV. 205 (1997) (discussing intersection of defamation, obscenity, Megan’s Law and other complex content issues on college campuses and the Internet).

191. RESTATEMENT (SECOND) TORTS § 559 (1977). Under California law, “libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” CAL. CIV. CODE § 45 (West 2002).

192. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting) (a “[d]efamed private citizen had to prove only a false publication that would subject him to hatred, contempt or ridicule.”).

193. *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”) (quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)).

194. At common law, two different results would occur if the republication was done by the publisher or if the republication was passive, such as by a bookseller who distributed the two works. In the early Internet libel cases, the analogy seemed to depend on the amount of editorial control retained by the ISP or bulletin board. *Compare* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (no liability because bulletin board system provides no means of control over postings), *with* *Stratton Oakmont, Inc. v. Prodigy*, 23 Media L. Rep. 1794, 1796-97 (BNA) (N.Y. Sup. Ct. 1995) (finding liability where Prodigy provided a “family oriented” mediated service). *See* Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 652 (2000).

195. Friedman & Buono, *supra* note 194, at 650 (“[A]n entity that distributes but does not exercise editorial control over defamatory material may only be liable if such entity knew or had reason to know of the defamation (i.e., distributor liability). News vendors, bookstores, and libraries generally qualify for this standard of liability.”).

196. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964).

197. *Gertz*, 418 U.S. at 347.

198. 47 U.S.C.A. § 230 (West 2002).

199. *Id.* § 230(c)(1).

200. *Id.* § 230(f)(2).

201. *Id.* § 230(f)(3).

202. *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The *Zeran* Court explained the reasoning for its expansive view of § 230 as follows:

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply ‘notify’ the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Id.

203. *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

204. RESTATEMENT (SECOND) TORTS § 652E (1977).

205. JON M. GARON, *INDEPENDENT FILMMAKING: THE LAW & BUSINESS GUIDE TO MAKING DIGITAL AND INDEPENDENT FILMS* 11 (2002).
206. *Time, Inc. v. Hill*, 385 U.S. 374, 384 (1967).
207. RESTATEMENT (SECOND) TORTS § 625B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).
208. *See, e.g., Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 124-26, 188 Cal. Rptr. 762, 767 (Cal. App. 1st Dist. 1983).
209. CAL. CIV. CODE § 3344 (Deering 2001).
210. *Id.* § 3344. The statute also provides for \$750.00 in statutory fees and injunctive relief.
211. *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 368, 92 Cal. Rptr. 2d 713, 718 (2d Dist. 2000) (holding that use of models’ photographs on subscription website constituted actionable violation of CAL. CIV. CODE § 3344, and thus not preempted by federal copyright laws).
212. *Id.*
213. “A core feature of the Web is ‘hypertext’ links. A link, often represented by a colored textual icon or graphic image, allows a user to ‘click’ on a designated area of the screen and transfer to the home page of another website, perhaps located on the other side of the world.” Frank C. Gomez, *Misappropriation: Washington Post v. Total News, Inc.*, 13 BERKELEY TECH. L.J. 21, 22 (1998).
214. *Ticketmaster Corp. v. Tickets.Com, Inc.*, 54 U.S.P.Q.2d (BNA) 1344, 2000 U.S. Dist. LEXIS 4553, at *6 (C.D. Cal. 2000) (“Further, hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) (“Copyright law protects an author’s expression; facts and ideas within a work are not protected.”).
215. *Los Angeles Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669 (defendant Free Republic was asked by *The L.A. Times* and *The Washington Post* to link to articles rather than reproduce the articles in full as it had done for the *Jewish World Review*, as a way to use plaintiff’s content in a non-infringing manner).
216. *See* 280 F.3d 934, 2002 U.S. App. LEXIS 1786 (9th Cir. 2002).
217. *Id.* at 944.
218. *Id.*
219. *Id.*
220. *Id.* at 945 (“By inline linking and framing Kelly’s images, Arriba is showing Kelly’s original works without his permission.”).
221. *See Ticketmaster Corp. v. Tickets.Com, Inc.*, 54 U.S.P.Q.2D (BNA) 1344, 2000 U.S. Dist. LEXIS 4553, at *7-8 (C.D. Cal. 2000).
222. *Id.* at *8.
223. Frank C. Gomez, *supra* note 213, at 22.
224. *Kelly*, 280 F.3d at 944.
225. *See Washington Post Co. v. Total News, Inc.*, 97 N.Y. Civ. Ct. 1190 (S.D.N.Y., complaint filed Feb. 20, 1997) (under a settlement agreement, Total News agreed to remove its frames, but retained the right to link to the plaintiff’s news content).
226. *Kelly*, 280 F.3d at 944.
227. “Search engines look for keywords in places such as domain names, actual text on the web page, and metatags.” *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999).

Metatags are HTML code intended to describe the contents of the web site. There are different types of metatags, but those of principal concern to us are the ‘description’ and ‘keyword’ metatags. The description metatags are intended to describe the web site; the keyword metatags, at least in theory, contain keywords relating to the contents of the web site. The more often a term appears in the metatags and in the text of the web page, the more likely it is that the web page will be ‘hit’ in a search for that keyword and the higher on the list of ‘hits’ the web page will appear.

Id.

228. *Mattel, Inc. v. Internet Dimensions, Inc.*, 2000 U.S. Dist. LEXIS 9747, 55 U.S.P.Q.2D (BNA) 1620 (S.D.N.Y. 2000).

229. *See* 15 U.S.C.A. § 1125(a), (d) (West 2002).

230. *Playboy Enters. Inc. v. Excite, Inc.*, No.CV-99-320-AHS, 1999 U.S. App. LEXIS 30215 (9th Cir. 1999).

231. *See* G. Peter Albert, Jr., *It Started With Domain Names*, BUREAU OF NAT’L AFFAIRS, Sept. 25, 2000 (copy on file with author).

232. *Id.*

233. “A domain name is part of a Uniform Resource Locator (URL), which is the address of a site or document on the Internet.” U.S. Patent and Trademark Office, *Trademark Examination of Domain Names, Examination Guide No. 2-99* (September 29, 1999), at <http://www.uspto.gov/web/offices/tac/notices/guide299.htm>.

234. *See, e.g.*, *Brookfield Communications, Inc., v. West Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999) (Moviebuff infringed by Moviebuff.com); *Mattel, Inc. v. Internet Dimensions, Inc.*, 2000 U.S. Dist. LEXIS 9747 (S.D.N.Y. 2000) (Mattel’s Barbie infringed by pornographic site, Barbiesplaypen.com).

235. *See* Massie Ritsch, *Parody Web Sites Skewer Campaigns*, L.A. TIMES, Apr. 23, 2000, at A26.

236. Meanwhile, www.algore.org is a commercial site used to divert traffic to a commercial credit service, [Creditcards.com](http://www.creditcards.com). *See also* *Algore.com*, at <http://www.algore.com/> (last visited Mar. 16, 2002) (site sold political trinkets and collectibles by PoliticalShop.com).

237. *See, e.g.*, *Online Partners.com, Inc. v. Atlanticnet Media Corp.*, 2000 U.S. Dist. LEXIS 783 (N.D. Cal. Jan. 18, 2000) (Gay.net successfully gained the website for Gaynet.com); *New York Soc’y of Certified Pub. Accountants v. Eric Louis Assocs.*, 79 F. Supp.2d 331, (S.D.N.Y. 1999) (Certified Public Accounts association won injunction and attorneys’ fees against commercial website using similar acronym).

238. 15 U.S.C. § 1125(d) (West 2002).

239. *Id.* The statute provides the following:

(1) (A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, with out regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark

Id.

240. *See* *Foxmews.com*, at <http://www.foxmews.com/> (last visited Mar. 16, 2002). Foxmews uses a logo graphically similar to Fox Television. *Id.* The site also includes a very large disclaimer, and is designed to provide comment on sensational news techniques. *Id.* This non-commercial satirical use may allow Foxmews to avoid trademark infringe-

ment.

241. See *Britanica.com*, at <http://www.britannica.com> and <http://www.britanica.com> (last visited Mar. 16, 2002).

242. See ICANN, *New TLD Program*, at <http://www.icann.org/tlds/> (last visited Mar. 16, 2002).

243. *Id.*

244. *Id.* The top-level domains (“TLD”) proposed are of two types: sponsored (.aero, .coop, and .museum) and unsponsored (.biz, .info, .name, and .pro). *Id.*

Generally speaking, an ‘unsponsored’ TLD operates under policies established by the global Internet community directly through the ICANN process, while a ‘sponsored’ TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.

Id.

245. See *Educause.edu Policy Information*, at <http://www.educause.edu/edudomain/policy.asp> (last visited Mar. 16, 2002).

246. *Id.* This presumably includes Educause itself, which would otherwise not be eligible under the policy.

247. *Id.* The extension to community colleges solves a long-running dispute that may have been the cause of the Department of Commerce’s insistence on the switch of registrars. The regional accrediting associations are recognized by the Department of Education as the supervisory body which reviews and monitors the curricular, academic, administrative and financial operations of the accredited institutions. The six U.S. regional accrediting associations referenced by Educause are the New England Association of Schools and Colleges (<http://www.neasc.org>); Middle States Association of Colleges and Schools (<http://www.msache.org>); North Central Association of Colleges and Schools (<http://www.ncahigherlearningcommission.org>); Northwest Association of Schools and Colleges ([\[www.cocnasc.org\]\(http://www.cocnasc.org\)\); Southern Association of Colleges and Schools \(<http://www.sacs.org>\); and Western Association of Schools and Colleges \(<http://www.wascweb.org>\). There are other, professional accrediting associations also recognized by the Department of Education, but those are not identified by Educause in the policy.](http://</p></div><div data-bbox=)

248. *ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

249. Family Educational Rights and Privacy Act (“FERPA”) of 1974, 20 U.S.C. § 1232(g) (1994 & Supp. IV 1998).

250. 18 U.S.C. §§ 2510, 2511 (Supp. V. 1999). See James Q. Walker, *Serving Clients Well: Avoiding Malpractice and Ethical Pitfalls in the Practice of Law*, 60 PRACTICING. L. INST. 297 n.4 (1999).

251. Pub. L. No. 99-508, 100 Stat. 1848 (codified in scattered sections of 18 U.S.C.).

252. Communications Assistance for Law Enforcement Act (“CALEA”), Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001-1010 (1994)). See Tatsuya Akamine, *Proposal For A Fair Statutory Interpretation: E-Mail Stored in a Service Provider Computer is Subject to an Interception Under the Federal Wiretap Act*, 7 J.L. & POL’Y 519 (1999).

253. See Akamine, *supra* note 252. Akamine identifies the following additional statutes: Foreign Intelligence Surveillance Act of 1978 (“FISA”), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-11 (1994), 18 U.S.C. § 2511 (1994 & Supp. III 1997), and 18 U.S.C. §§ 2518-19 (1994)); CALEA, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001-10 (1994) and in scattered sections of 18 and 47 U.S.C.) (CALEA requires telephone companies’ cooperation with law enforcement and also extends the protections under the ECPA to a cordless telephone); Privacy Act of 1974, 5 U.S.C. § 552a (1994 & Supp. III 1997) (regulating government’s handling of individual information); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1994 & Supp. III 1997) (regulating credit reporting agencies to protect the confidentiality of credit reports); Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2710-11 (1994) (prohibiting video stores from disclosing customers’ rental

- records); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 15, 18, 46, 47 and 50 U.S.C.) (prohibiting cable operators from disclosing customers' viewing records). *Id.* at 519 n.5.
254. *See* Bohach v. City of Reno, 932 F. Supp. 1232, 1236-37 (D. Nev. 1996) ("An 'electronic communication,' by definition, cannot be 'intercepted' when it is in 'electronic storage,' because only 'communications' can be 'intercepted,' ..."); United States v. Reyes, 922 F. Supp. 818, 836 (S.D.N.Y. 1996); Steve Jackson Games, Inc. v. United States Secret Serv., 36 F.3d 457, 460 (5th Cir. 1994).
255. *See, e.g.,* U.S. v. Charbonneau, 979 F. Supp. 1177, 1184-85 (S.D. Ohio 1997) (e-mail transmission enjoys a limited reasonable expectation of privacy); United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) (because of privacy policy and the private storage of e-mail by America Online, the military court found its users are afforded more privacy than other Internet messages).
256. *Bohach*, 932 F. Supp. at 1236-37. *See also* Steve Jackson Games, Inc., 36 F.3d at 460.
257. 18 U.S.C. § 2511(2)(d) (West 2002). State law and other statutory provisions may require the permission of both parties to the transmission.
258. *See generally* Stratton Oakmont Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
259. Curtis v. DiMaio, 46 F. Supp.2d 206, 209-10 (E.D.N.Y. 1999) (dismissing claims of a hostile work environment stemming from racial jokes sent via e-mail and forwarded to ten additional readers).
260. Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (allowing for discovery of hard drive because defendant regularly deleted e-mail from system). The court nonetheless recognized that e-mail to attorneys was protected by attorney-client privilege. *Id.* Welles ultimately prevailed under the claims of fair use for the metatags in her "Playmate of the Year" description of her website. *Id.*
261. *See, e.g.,* Unsolicited Electronic Mail Act of 1999, H.R. 3113, 106th Cong. (1999).
262. *Id.* The requirements also serve as a code of good practice until such time as the legislation becomes law (if ever). Most importantly, be courteous, brief and provide both legitimate contact information and a method for recipients of the e-mail to request that no future e-mail be sent to that recipient.
263. Kim S. Nash, *Amazon.com Revises Privacy Policy on Use of Customer Data*, COMPUTERWORLD (Sept. 11, 2000), at http://www.computerworld.com/cwi/story/0,1199,NAV47_STO49388,00.htm.
264. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). *See* Mark G. Young, Note, *What Big Eyes and Ears you have!: A New Regime for Covert Governmental Surveillance*, 70 FORDHAM L. REV. 1017, 1063 (2001).
265. *Id.*
266. Scott Carlson & Andrea L. Foster, *Colleges Fear Anti-Terrorism Law Could Turn Them Into Big Brother*, CHRON. OF HIGHER ED., Mar. 1, 2002, at A31.
267. USA Patriot Act § 507, 20 U.S.C.S. § 1232g(j) (2001).
268. *Id.* § 1232g(j)(3).
269. *See* Dep't of Justice, Computer Crime and Intellectual Property Section ("CCIPS"), *Field Guidance on New Authorities That Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001*, at <http://www.usdoj.gov/criminal/cybercrime/PatriotAct.htm> (last visited Mar. 16, 2002) [hereinafter *Field Guidance*].
270. USA Patriot Act § 202. *See Field Guidance, supra* note 269.
271. USA Patriot Act § 209.
272. *Id.*; *see Field Guidance, supra* note 269.
273. USA Patriot Act § 210.
274. *See* Carlson & Foster, *supra* note 266, at A31.
275. 18 U.S.C.S. § 2702 (West 2002). Prior to the amend-

ment, the law was extremely important because it allowed ISPs, including academic institutions, to disclose the content of any communication “with the lawful consent of the originator or an addressee or intended recipient of such communication,” which typically meant the academic institution could obtain or imply consent to route and operate its network without significant privacy concerns. *Id.*

276. *Id.* § 2702(b).

277. *Id.*

278. *See* Carlson & Foster, *supra* note 266, at A31.

279. *Id.*

280. *Id.*

281. USA Patriot Act, Pub. L. No. 107-56, § 1016, 115 Stat. 272 (2001).

282. *Id.*