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ARTICLES

Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students

Lynn Daggett 505

This article explores disability discrimination claims by academically dismissed law students. In part because of the Supreme Court's new, strict standards for defining who has a legal disability, and because of courts' deference to law schools' academic readmissions decisions even where a disability is claimed, dismissed students' disability discrimination claims have been notably unsuccessful. The article includes guidelines for law schools to make principled readmissions decisions which comply with disability laws.

“Is Someone Riding Around a Golf Course from Shot to Shot Really a Golfer?” The Supreme Court Determines the Essence of the Game of Golf—and What the Decision Could Mean for Learning Disabled Students in Higher Education

Suzanne Wilhelm 579

Accommodating disabled students in higher education provokes controversy nationwide. As colleges and universities strive to accommodate disabled individuals, very few cases ever reach the courts. When they do, students, like most disability claimants, rarely win. Once students establish that they are disabled, they must still overcome the deference that courts have traditionally given to accommodation decisions by institutions of higher learning. The *Casey Martin* decision could have an impact on how courts decide this issue.

Copyright Implications for Online Distance Education

Audrey W. Latourette 613

In seeking to utilize the multitude of resources available in the construction of hybrid and online distance education courses, colleges and universities must comply with the requisites of copyright law. This article addresses the Copyright Act and its fair use doctrine; the TEACH Act and

the responsibilities this statute imposes on colleges and universities desirous of utilizing its expanded ability to incorporate copyrighted works into hybrid and distance education courses; copyright ownership issues; and public domain, sovereign immunity and orphan works concerns as related to traditional and online distance education courses.

The article suggests issues an institution of higher education should consider with respect to adopting a comprehensive copyright policy that both satisfies the mandates of the TEACH Act and reflects its commitment to the intellectual property rights of others.

Who Are You? Fraudulent Credentials and Background Checks in Academe

Barbara A. Lee 655

Misrepresentation of job qualifications has been spotlighted in recent years as faculty, athletics coaches, and high-level administrators have claimed academic degrees they did not possess or have obtained “academic degrees” from diploma mills. This article addresses fraudulent credentials and the use of background checks for faculty and staff positions at colleges and universities. It reviews potential legal liability for institutions that do (or do not) choose to use background checks, employer liability when a candidate for a position is not hired or is dismissed as the result of a background check, and legal and policy considerations in developing a policy for using background checks for employment decisions.

ESSAY

The P2P File Sharing War After *Grokster*: It Feels Like Belgium Over Here

David Harrison 681

Ironically, as the content community attempts to save its business models, it has engaged in open warfare with its own customers. College and university campuses are increasingly becoming the unwilling battleground for the P2P file sharing war because the majority of the customers are students in higher education. This essay discusses the file sharing problem, the basic rights of copyright owners, the architecture of P2P technology, the primary defenses to P2P copyright infringement, the evolving case law, the risks for higher education, and model responses to P2P file sharing and infringement.

NOTE

The Times They Are A-Changin': How Current Provisions of the Digital Millennium Copyright Act, Recent Developments in Indirect Copyright Law and the Growing Popularity of Student Peer-to-Peer File-Sharing Could "Chill" Academic Freedom and Technological Innovation in Academia

Brian McCormick 709

Despite recent attempts to curb online copyright infringement, the number of college and university students illegally "trading" copyrighted material over peer-to-peer (P2P) computer networks has never been greater. This article highlights the pervasiveness of this practice on campuses nationwide and summarizes efforts taken to suppress it. More importantly, it describes how this epidemic, in concert with current aspects of copyright law, could have a "chilling" effect on academic freedom and technological innovation throughout academia.

DOING THE RIGHT THING: DISABILITY DISCRIMINATION AND READMISSION OF ACADEMICALLY DISMISSED LAW STUDENTS

LYNN DAGGETT*

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I. AN ILLUSTRATIVE SCENARIO

Law schools regularly deal with academically dismissed students claiming that disability resulted in their academic failure, and asserting that, perhaps with accommodations, they can be successful if readmitted. Consider, for example, the following scenario:

A law student (“Student”) with a 1.87 GPA is dismissed at the end of her first year for failing to earn her law school’s (“Law School”) minimum required GPA of 2.0. Student petitions for readmission, asserting that her just-diagnosed learning disability of dyslexia/reading disorder caused her academic failure. Student’s petition also asserts that if she is readmitted and provided with accommodations for her disability consisting of: a) tutoring, b) note taking assistance, c) elimination of the writing requirement (a graduation requirement in which students must research and write an academic paper similar to a law review article), and d) extra time on exams, she will be successful. Student’s petition notes that she always suspected she had a reading problem since she reads very slowly, and after receiving her fall grades (averaging 1.75), she suspected she might have dyslexia and considered getting tested, but decided to “tough it out.” Student’s spring grades averaged 1.92.

In support of her petition Student submits an evaluation report from a clinical psychologist (“Evaluator”), dated after Student’s dismissal. In it, Evaluator diagnoses Student with the specific learning disability of dyslexia/reading disorder, based in large part on testing that indicates Student’s reading speed and decoding skills are well below average as compared with college graduates. Evaluator concludes that Student is therefore covered by Section 504 and the ADA. The report states that Student has always had this learning disability, which has caused her great difficulty in reading, particularly in decoding words, and greatly slowed her reading speed, but Student has used her above average intelligence and self-developed coping strategies to compensate prior to law school. Evaluator recommends Student receive tutoring, note taking assistance, extra time on exams, and elimination of the writing requirement. Evaluator concludes: “In my professional opinion Student is a bright, motivated young woman who will succeed in law school if these accommodations are provided.”

Law School solicits feedback from Student’s teachers, two of whom report that Student seems not to have mastered legal analysis or many of the basic concepts. A review of Student’s file reveals she earned a B average as a political science major at a state university. Student’s LSAT score was quite low compared with those of her classmates, and Student was admitted to Law School contingent upon her beginning in the summer and taking a reduced load. Student’s tutor in the Law School’s Academic Resource Program notes that Student missed several scheduled sessions, and also that Student was extremely active in extracurricular activities. In her appearance before the committee, student agrees that she was an active member of six student groups.

Law School’s readmission rule was adopted by the faculty and is contained in Law School’s academic rules, which are set out in the student handbook. The readmission rule requires a recommendation by a faculty committee to the faculty,

which decides the matter by majority vote. The burden is on the dismissed student to demonstrate that

- 1) the failure was caused by extraordinary circumstances, which are defined as difficulties beyond those regularly encountered by law students (such as minor illness or the end of a romantic relationship), excluding those for which the student had a reasonable opportunity to recover or obtain administrative relief prior to being dismissed, and
- 2) if readmitted, there is a convincing likelihood the student will achieve good standing in law school, and be able to pass a bar exam and practice law competently.

Law School's recent graduates have had some difficulty with its state's bar exam; in several recent administrations, Law School's graduates' pass rate has been below the state average. A recent analysis by Law School of the bar exam performance of readmitted students over the past few years indicates that few of them have passed the bar exam.

Law School must decide whether to readmit Student. That decision is always difficult and complex; it is even more so in Student's case. Deciding whether to readmit Student involves reviewing technical information concerning her learning disability, and considering: a) whether Student's learning disability is protected by federal disability discrimination statutes as Evaluator asserts, b) whether the learning disability is an extraordinary circumstance as defined by Law School's readmission rule, c) what caused Student's academic failure, d) whether the requested accommodations are reasonable, and e) whether with (or without) accommodations there is a convincing likelihood Student will succeed in law school, on the bar exam, and in practice. In Student's case, Law School also faces review of its decision beyond that available to dismissed students generally. Specifically, if Student believes Law School has acted on her petition in a way which is discriminatory, she may file an internal complaint under the school's disability policy, an administrative complaint with the Office of Civil Rights and/or a lawsuit alleging violation of federal disability discrimination laws.

This scenario is entirely fictitious, and any resemblance to any person is purely coincidental. It does, however, illustrate the kinds of situations law schools increasingly face. For example, during one recent year at the law school at which the author is a professor, five of twelve readmissions petitions asserted an impairment as the reason for academic failure. In each of these cases, the petitioning student submitted expert information concerning the existence of an impairment, requested accommodations, and claimed that with the accommodations she would be successful if offered a second chance.

II. INTRODUCTION

This article examines disability discrimination claims brought by academically dismissed law students who have been denied readmission to law school, including the claims that Student in the above scenario might bring if Law School does not

readmit her.¹ Part III of the article offers an overview of Section 504 of the Rehabilitation Act of 1973 (“Section 504”)² and the Americans with Disabilities Act (“ADA”),³ the two federal statutes that prohibit disability discrimination against covered higher education students, and under which Student may file claims concerning Law School’s decision not to readmit her. This overview pays particular attention to recent United States Supreme Court decisions that strictly interpret the “disabilities” protected by these statutes,⁴ and to recent cases in which lower courts have accordingly held that a graduate student’s impairment is not a statutorily protected disability.⁵ The statutory overview also compares the markedly different approaches of Section 504 and ADA provisions concerning disability discrimination and higher education students, to the federal preK-12 special education statute (the Individuals with Disabilities Education Act (“IDEA”)).⁶ Many such students were served under the IDEA earlier in their educational careers, which shaped their expectations about their eligibility and protection under higher education disability law.

Part IV of the article offers a cursory introduction to the Supreme Court’s tradition of deference to higher education academic decisions, recently reiterated in the University of Michigan affirmative action cases, in which higher education admissions decisions were challenged as racially discriminatory.⁷ The Court has not yet decided a case in which an academically dismissed student claims disability discrimination. The Court has, however, deferred to higher education institutions when higher education academically dismissed students made constitutional claims,⁸ and appeared to defer to a higher education institution’s decision concerning the impact of a student’s disability on her qualifications for admission to a higher education program.⁹ There is thus every indication the Court would defer to a law school’s judgment in a case where an academically dismissed law student claimed disability discrimination.

Part V of the article reviews the body of law (both court cases and Office for Civil Rights in the U.S. Department of Education (“OCR”) administrative opinions) in which academically dismissed higher education students who were

1. For other brief discussions of this issue, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 140–41 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 258 (2000); Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1, 35–39 (1996); Adam Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J.C. & U.L. 989, 1004–08 (1996).

2. 29 U.S.C. § 794 (2000).

3. 42 U.S.C. §§ 12101–12213 (2000).

4. See *infra* Section III.A.2.

5. See *id.*

6. 20 U.S.C. §§ 1401–1461 (2000).

7. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

8. See *infra* notes 108–111 and accompanying text.

9. See *infra* note 109 and accompanying text.

denied readmission have made disability discrimination claims. In the overwhelming majority of these cases and opinions, including all of the court cases involving law schools,¹⁰ schools have prevailed without going to trial, normally by receiving summary judgment.¹¹ Moreover, courts in these cases have regularly announced a policy of deferring to the school's academic decisions concerning academic dismissal and readmission.¹² Examination of the few court cases in which (non law) schools were not granted summary judgment offers helpful guidance to law schools faced with such claims.¹³ In Part VI, the article finds that the courts' deferential approach in these cases is appropriate, although no doubt frustrating to students whose planned careers may well have ended.¹⁴ Finally, Part VII offers guidelines and options for law schools trying to do the right thing (that is, to make a decision which is both principled and nondiscriminatory) when faced with readmissions petitions by Student or other dismissed students claiming a disability.¹⁵

III. APPLICABLE FEDERAL STATUTES – SECTION 504 AND THE ADA

Law schools are subject to two federal statutes which prohibit disability discrimination against covered students, as well as employees.¹⁶ Section 504¹⁷ of the Rehabilitation Act of 1973¹⁸ applies to schools, including public and private higher education institutions, which receive any federal education funds.¹⁹ The Americans with Disabilities Act ("ADA") applies to a much broader variety of institutions, and without regard to whether they receive federal funds, including state and local government-run "public entities" (including state law schools) (Title II),²⁰ and "places of public accommodation," specifically defined to include private schools (Title III).²¹ Thus, virtually all public law schools are forbidden from discriminating against covered students with disabilities by both Section 504 and

10. *See infra* Section V.B.

11. *See infra* note 135 and accompanying text.

12. *See infra* notes 136, 147, 156, 184 and accompanying text.

13. *See infra* Section V.C.

14. *See infra* Section VI.

15. *See infra* Section VII.B.

16. For overviews of the statutes' applicability to higher education, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241 (2000).

17. 29 U.S.C. § 794 (2000).

18. 29 U.S.C. §§ 701–795 (2000).

19. 29 U.S.C. § 794(b)(2)(A) (2000) (defining covered "program or activity" in pertinent part as a college or university); 34 C.F.R. § 104.3(h) (2006) (defining "federal financial assistance"). Much of the meat of Section 504's obligations for schools are set out in its regulations, which include separate sections and separate standards for K-12 public schools, 34 C.F.R. §§ 104.31–38 (2006), K-12 private schools, 34 C.F.R. § 104.39 (2006), and higher education, 34 C.F.R. §§ 104.41–47 (2006).

20. 42 U.S.C. §§ 12131–12134 (2000).

21. *Id.* at §§ 12181–12189.

Title II of the ADA, and private law schools by both Section 504 and Title III of the ADA. Law schools must also comply with any applicable state laws.²²

The ADA is modeled after Section 504, and as it concerns higher education students with disabilities, the two statutes are essentially the same.²³ In fact, the ADA explicitly provides that no less than the applicable Section 504 standard shall apply to the ADA.²⁴

A. Covered Persons

1. Person with a disability; impairments

The two federal statutes define “person with a disability” essentially identically²⁵ and broadly: rather than listing covered disabilities, the statutes refer to persons with a “physical or mental impairment” (present, past, or perceived) which “substantially limits” a “major life activity” (such as learning or walking).²⁶ Learning disabilities may be the most common impairment of law students; according to one survey, more than half of law students who requested accommodations had learning disabilities.²⁷ Under Section 504 and the ADA, it is the higher education student’s responsibility to self-identify as having a disability, and to pay for and provide the school with appropriate documentation of the impairment.²⁸

22. Discussion of applicable state laws is beyond the scope of this article. It should be noted, however, that such laws might impose additional obligations on law schools, such as defining covered students more broadly than do the federal statutes, and/or imposing obligations beyond the federally required academic adjustments.

23. See Tucker, *supra* note 1, at 2 (“With one possible exception, that being in the area of safety, the ADA does not add any substantive protections for individuals with disabilities in the postsecondary education context, although in some contexts there are procedural differences.”).

24. 42 U.S.C. § 12201(a) (2000) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”), cited in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002).

25. 29 U.S.C. § 706(8)(B) (2000) (Section 504); 42 U.S.C. § 12102 (2000) (ADA). See *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 193 (“Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act, § 706(8)(B)”).

26. 42 U.S.C. § 12102(2) (2000) (ADA definition); 29 U.S.C. § 705(a) (2000) (Section 504 definition).

27. Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 570 (1996) (stating that 54% of students requesting exam accommodations have learning disabilities).

28. See BONNIE TUCKER & BRUCE GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW § 9IID (2005); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998); *Brown v. Univ. of Cincinnati*, 2005 WL 1324885 at *10 (S.D. Ohio 2005).

2. Substantial limitation – mitigators and comparison to the average person

As the Supreme Court has noted, “[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity . . . [a]nd further show that the limitation on the major life activity is ‘substantial.’”²⁹ The Court has also determined that the extent to which an impairment is limiting must be examined in light of any mitigators, such as hypertension medication, or corrective aids such as eyeglasses.³⁰ The Court rejected the argument that persons in these situations were “regarded as disabled” and thus covered by the statutes, requiring that persons must be perceived to have a condition which substantially limits a major life activity to be “regarded” as having an impairment.³¹

In a 2002 decision, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that “substantial” limitation involves “considerable or to a large degree”³² “permanent or long-term”³³ impairment of activities “that are of central importance to daily life,”³⁴ and further noted that “these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled.”³⁵ The Court also quoted EEOC regulations indicating that the ability to perform a major life activity must be substantially limited as compared to the average person:

According to the EEOC regulations, ‘substantially limited’ means

29. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 195 (2002).

30. *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons v. Kirkingburg*, 527 U.S. 555 (1999).

31. The Court limited the “regarded as” prong to cases where the person is believed to have a substantially limiting disability when in truth there is either no disability, or a disability which is not substantially limiting. *Sutton*, 527 U.S. at 489–94 (1999).

32. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196–97 (2002) (citing dictionary definitions of “substantial”).

33. *Id.* at 198 (“The impairment’s impact must also be permanent or long term.”) (citing EEOC regulations). *See, e.g.*, *Sanders v. Arneson Prods.*, 91 F.3d 1351 (9th Cir. 1996) (finding that psychological impairment lasting four months is not a statutory disability); *Ogburn v. UFCW Local 881*, 305 F.3d 763 (7th Cir. 2002) (short term depression is not a statutory disability); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (short term major depression mitigated with medicine was not a statutory disability). *See also* 29 C.F.R. Part 1630 App. § 1630.2(j) (2006) (listing examples of temporary impairments which are not statutory disabilities).

34. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 197 (“‘Major life activities’ thus refers to those activities that are of substantial importance to daily life.”) (citing the dictionary definition of “major”).

35. *Id.* at 197. The Court also held that the “substantially limiting” determination must be made on an individualized basis for each person. *Id.* at 199 (noting the wide range of severity of carpal tunnel syndrome). In an earlier case, the Court affirmed a lower court finding that an asymptomatic HIV-positive plaintiff was a person with a disability *per se* under the ADA, and specifically a physical impairment which substantially impaired the major life activity of reproduction. *Bragdon v. Abbott*, 524 U.S. 624 (1998). The plaintiff in *Bragdon* had decided not to have a child because of her condition. *Id.* at 641. The Court also noted the real and significant medical risk of transmission to the child and/or to the partner during conception. *Id.* at 639–41 (finding that “[c]onception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health”).

‘[u]nable to perform a major life activity that the average person in the general population can perform;’ or ‘[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.’³⁶

Thus, the Court noted that an employee who alleged that her carpal tunnel syndrome substantially impaired her in the major life activity of performing manual tasks, an impairment which kept her from performing assembly line work but not from performing daily living tasks such as brushing her teeth, may not in fact have a statutorily protected disability.³⁷

Following *Toyota*, several courts have found graduate students’ diagnosed mental impairments (such as learning disabilities and ADHD) not to “substantially” limit learning in the specialized graduate school context and thus not to amount to statutory disabilities. These decisions involved students with a history of academic success at least through college without accommodations, and/or a diagnosis based on test scores which documented below average performance only as compared with other highly educated persons, rather than below average performance as compared with the general population.

Most recently and notably, in *Wong v. Regents of California* (“*Wong II*”),³⁸ a case involving a dismissed medical student diagnosed with a learning disability, the Ninth Circuit affirmed a summary judgment for the school, holding that the student’s undisputed learning disability impairment was not a statutory disability as a matter of law.³⁹ The Court relied on the student’s long history of academic achievement without accommodations: a 3.5 college GPA in biochemistry,⁴⁰ a good MCAT score, successful completion of the first two years of medical school, and passing the Boards Step 1 (a national standardized test taken after two years of medical school and required for physician licensing).⁴¹ The student failed some clinical work, and then was diagnosed with a learning disability,⁴² but was dismissed,⁴³ and filed a disability discrimination claim. Most other courts that

36. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 195–96 (citing 29 C.F.R. § 1630.2(j) (2006)).

37. *Id.* at 199–203 (remanding for determination of whether the undisputed physical impairment was substantially limiting to the plaintiff and thus statutorily covered).

38. 410 F.3d 1052 (9th Cir. 2005). In an earlier decision in the same case, the court denied the school’s motion for summary judgment on a different theory (specifically that no reasonable jury could find that the requested accommodations for alternative test formats were reasonable ones), since there was not a record of the school’s accommodations/readmissions decision-making process. *Wong v. Bd. of Regents of Univ. Of Cal.*, 192 F.3d 807 (9th Cir. 1999) (“*Wong I*”), discussed *infra* at notes 222–228 and accompanying text.

39. *Wong II*, 410 F.3d at 1056.

40. *Id.* at 1056–57.

41. *Id.* at 1057.

42. *Id.* Testing revealed Wong’s reading comprehension was in the 99th percentile untimed, but at an eighth grade level under time limits. *Id.* at 1066. For the *Wong II* court the student’s testing documentation of poor timed reading speed as compared with the general population was insufficient evidence to survive summary judgment in light of the student’s long history of success without accommodations.

43. *Id.* at 1057–58. Typically in medical school third and fourth year students rotate through various hospital departments such as internal medicine and surgery. During each rotation

have addressed the issue have reached similar results.⁴⁴

This approach to defining statutory disability likely makes little difference for certain physical or sensory impairments such as deafness, blindness, and cerebral palsy. On the other hand, as several legal commentators in fact suggest, using the *Toyota* general population or “most people” standard means few if any law or other higher education students with newly diagnosed learning disabilities will be legally entitled to receive accommodations; these commentators disagree about whether this is a good result.⁴⁵

students not only perform direct patient care but also read extensively on diagnosis and treatment of conditions and diseases treated by the department in which the student is doing a rotation in preparation for an exam.

44. See, e.g., *Marlon v. W. New Eng. Coll.*, 2003 WL 22914304 (D. Mass. 2003), *aff'd*, 124 F. Appx. 15 (1st Cir. 2005) (dismissed law school student diagnosed with several physical and cognitive impairments (learning disability, depression and panic attacks) did not have a statutory disability; student had worked successfully as a paralegal without accommodations before and after her time in law school, before law school the student had been academically successful in college and professionally successful as a paralegal, all without accommodations); *Brown v. Univ. of Cincinnati*, 2005 WL 1324885 (S.D. Ohio 2005) (summary judgment for medical school in a disability discrimination claim brought by a dismissed student in his last year of medical school diagnosed with reading disorder and generalized anxiety disorder who had performed well in high school and college without accommodations); *In re Allegheny Health, Educ. and Research Found.*, 321 B.R. 776, 793–95, 797, 803–04 (Bankr. W.D. Pa. 2005) (disallowing dismissed student’s claims for more than \$8 million against bankrupt medical school, since none of the student’s three evaluations indicated below average learning abilities as compared to other adults in general or those her age, and also rejecting claim that school regarded student as having a statutory disability absent evidence the school perceived the student as having a substantially limiting impairment).

Some courts performed a similar analysis in pre-*Toyota* cases. *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 980 (10th Cir. 1998) (medical student with “test anxiety” anxiety disorder manifesting on certain exams does not have a substantially limiting disability; “[a]n impairment limited to specific stressful situations, such as the mathematics and chemistry exams which trigger [the student’s] anxiety, is not a disability under the Rehabilitation Act.”); *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 60 F. Supp. 2d 703 (E.D. Mich 1999) (student diagnosed with reading disorder and disorder of written expression); *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419 (S.D. W.Va. 1997) (three students all diagnosed attention deficit disorder, two of whom were also diagnosed with reading disorder and disorder of written expression).

Not every lower court interprets *Toyota* this way. For example, in *Singh v. George Washington University* a federal district court found that it was appropriate to compare a medical student to other college graduates to determine if her learning disability was substantially limiting. 368 F. Supp. 2d 58, 65–68 (D.D.C. 2005).

45. See, e.g., Melissa Krueger, *The Future of ADA Protection for Students With Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607 (2000) (relying on public policy as well as EEOC regulations defining “substantial” limits on the major life activity of working for employees, which require comparison with other persons of similar training and experience, 29 C.F.R. § 1630.2(j)(3), to suggest that for the major life activity of learning, the substantiality of the impairment be measured with reference to a group of similar age and education level (e.g. a reference group of college graduates for law students)); Gregory Murphy, *Toyota v. William and the Late-Discovered Learning Disability*, 74 BAR EXAMINER 46, 48–49 (2004); Stuart Duhl & Gregory Duhl, *Testing Applicants with Disabilities*, 73 BAR EXAMINER 7, 10 (2004) (after *Toyota* testing accommodations for bar examinees require proof of impairment in “performing mental or physical tasks of central importance to their daily lives, and not tasks that are tied only to taking the bar examination or practicing law”).

Bar examiners have adjusted to the *Toyota* standard for statutory disabilities by training disability experts on these legal standards and having them review requests for accommodations on bar exams, including whether the examinees requesting accommodations are in fact statutorily disabled. These specially trained disability experts agree that many mental impairments (such as psychiatric disabilities, ADHD, and learning disabilities) first diagnosed in graduate students do not substantially impair learning and thus do not amount to statutory disabilities.⁴⁶

Commentary from these disability experts also provides insight into the perspective of evaluators who diagnose these impairments. One psychiatrist who works with bar examiners to review requests for bar exam accommodations from persons with psychiatric impairments notes “treating physicians, therapists and other caregivers are ethically required to act as advocates for their patients, and as a result their reports are rarely neutral or unbiased.”⁴⁷ A neurophysiologist who works with bar examiners to review requests for bar exam accommodations similarly notes concerns that evaluators often appear to be acting as advocates rather than with impartiality, are more familiar with and oriented to IDEA disability standards rather than the standards for statutory disabilities for higher education students, and “typical clinical practice involves a natural desire to be helpful to the individual requesting and paying for services.”⁴⁸

46. See, e.g., John Ranseen, *Reviewing ADHD Accommodation Requests: An Update*, 69 BAR EXAMINER 6, 10–11 (2000) (a student diagnosed with ADHD likely does not have a statutory disability “if [such] an individual has never been afforded accommodations yet has been able to complete an undergraduate education and achieve law school admittance”); Michael Gordon, Kevin Murphy & Shelby Keiser, *Attention Deficit Hyperactivity Disorder (ADHD) and Test Accommodations*, 67 BAR EXAMINER 26, 31 (1998) (“[I]t is nearly impossible to justify the [ADHD] diagnosis when symptoms suddenly arise after high school graduation. It is particularly hard when the first instance of any real problems arose after graduation from college How impaired can a person be relative to the general population if the worst of his or her problems occurs in academic settings far beyond the reach of most people? Without persuasive proof that impairment has been long-standing, consistent, and truly disruptive to normal functioning, the diagnosis is likely inappropriate.”).

47. Douglas Tucker, *Accommodations for Psychiatric Disabilities on the Bar Examination: Perspectives from an Expert Reviewer*, 71 BAR EXAMINER 14, 17 (2002) (noting the “strong incentives” for persons seeking accommodations to “distort their responses” and urging evaluators to be vigilant in ferreting out any such attempted distortion and not rely solely on information reported by the examinee to arrive at a diagnosis).

University disability services offices as well as evaluators may operate from an advocacy perspective. See Association for Higher Education and Disability (“AHEAD”) Professional Standards 2.1 (university disability services providers “[s]erve[] as an advocate for students with faculty or administrators”), available at <http://www.ahead.org/resources.php> (last visited Sept. 22, 2006); AHEAD Program Standards and Performance Indicators 1.1 (“[T]he office that provides services to students with disabilities should . . . serve as an advocate for issues regarding students with disabilities. . . .”), available at <http://www.ahead.org/resources.php> (last visited Sept. 22, 2006).

48. Ranseen, *supra* note 46, at 15–16 (urging evaluators who consider an ADHD diagnosis to rely primarily on outside evidence of attention difficulties beginning in childhood, rather than self-reported history or test scores); *id.* at 16 (citing unpublished research indicating the majority of evaluators think disability involved comparison to peers rather than the general population and

These developments do not mean there are not substantial numbers of law students with statutory disabilities. For example, the law school where the author is a professor has enrolled and graduated students with physical disabilities such as cerebral palsy and quadriplegia, sensory disabilities such as legal blindness and deafness, and mental impairments which amount to statutory disabilities such as dyslexia diagnosed in childhood and requiring special education since that time. These developments also do not mean law students should not pursue an initial disability diagnosis while in law school. Diagnosis of an impairment, even if it does not amount to a statutory disability and trigger eligibility for law school accommodations, may offer the law student an opportunity for helpful treatment (pharmacological, compensatory strategy and/or therapy) which may enhance the student's functioning, academic and otherwise. These developments do mean that many law students, law schools, evaluators, and other officials such as university disability offices need to reexamine their beliefs concerning legal disabilities.

B. "Qualified"

To be covered, students must also be "qualified"⁴⁹ for the school's program, meaning that they can "meet[] the academic and technical standards requisite to admission or participation in the recipient's education program or activity,"⁵⁰ at least if certain academic or other adjustments, often referred to as "reasonable accommodations," are made.

In its first Section 504 case, the Supreme Court held that a prospective nursing student whose deafness, even with reasonable accommodations, prevented her from being able to succeed in the clinical portions of her training,⁵¹ was not otherwise qualified and therefore not protected by Section 504.⁵² In the context of defining "qualified" for academically dismissed law students, such students' dismissal makes them not qualified to continue in law school. However, they are otherwise qualified to *apply for* readmission and have their petitions considered on a nondiscriminatory basis with the petitions of other students without disabilities.

C. Substantive Entitlements of Eligible Students

For covered students, Section 504 and the ADA also impose the same obligations on schools: nondiscrimination, making their programs physically accessible,⁵³ and making some "academic adjustments" (or "reasonable accommodations," referred to in this article as "accommodations") to their

reporting similar conclusions regarding knowledge level and orientation of evaluators).

49. See 29 U.S.C.A. § 794(a) (2002).

50. 34 C.F.R. § 104.3(l)(3) (2006).

51. Parts of the clinical training involved work in operating rooms and intensive care units where the caregivers are masked and lip-reading would thus not be possible. *Id.* at 403.

52. See *Cnty. Coll. v. Davis*, 442 U.S. 397 (1979).

53. See, e.g., 29 U.S.C. § 794c (2000) (Section 504); 42 U.S.C. §§ 12146–47 (2000) (ADA Title II); 42 U.S.C. § 12183 (2000) (ADA Title III).

programs to accommodate students' disabilities.⁵⁴ On the other hand, schools are not required to alter any of the basic, essential requirements of their programs, such as minimum GPA and attendance requirements.⁵⁵

Students have the burden of documenting a disability and requesting adjustments/accommodations.⁵⁶ Schools must offer accommodations which are necessary to allow the student with a disability to participate in a nondiscriminatory basis with persons who do not have disabilities.⁵⁷ Such accommodations are to be determined on a case-by-case basis and do not include those which would pose an "undue hardship," either financially or administratively, on the school.⁵⁸ The regulations include examples of academic adjustments,⁵⁹ and explicitly exclude "devices or services of a personal nature" such as "attendants, individually prescribed devices, [or] readers for personal use or study."⁶⁰ Thus, schools are generally not required to offer tutors to students, although to the extent a school makes tutoring services available (perhaps through an Academic Resource Program or upper-class students offering weekly tutorials for 1L classes) they must be available on a nondiscriminatory basis to students with disabilities.⁶¹ Common reasonable accommodations for law students with disabilities include access to special technology (such as casebooks on CD), note-taking assistance, and extra time on examinations.⁶²

Schools are also not required to provide accommodations which would compromise the essential requirements of their programs. However, whether a

54. 34 C.F.R. § 104.44 (2006) (Section 504); 28 C.F.R. § 36.302 (2006) (ADA Title III).

55. 34 C.F.R. § 104.44 (2006) (Section 504).

56. See TUCKER & GOLDSTEIN, *supra* note 28, at § 9IID.

57. 34 C.F.R. § 104.44(a) (2006) ("A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating . . .").

58. *Id.* ("Academic requirements that the recipients can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.")

59. See 34 C.F.R. § 104.44 (2006). The regulations require that recipients of federal funding allow extra time to complete degree requirements, substitution of required courses, "adaptation of the manner in which specific courses are conducted, 34 C.F.R. § 104.44(a) (2006), waivers of rules which limit the student's participation such as allowing a student whose disability precludes effective note-taking to tape record class or waiving a no animal rule for a service animal, 34 C.F.R. § 104.44(b) (2006), evaluating students in a nondiscriminatory way, 34 C.F.R. § 104.44(c) (2006), and providing "auxiliary aids" such as "taped texts, interpreters, orally delivered materials . . . , [and] readers in libraries" 34 C.F.R. § 104.44(d) (2006).

60. *Id.*

61. Letter to: Or. State Univ., 5 NDLR 19 (OCR 1993). See also *Robinson v. Hamline Univ.*, 1994 WL 175019 (Minn. App. 1994) (so holding with regard to state discrimination law modeled on Section 504 in case brought by dismissed law student). Moreover, to the extent the school offers services beyond reasonable accommodations, it may charge for them. *Id.*

62. For a report on a law school survey regarding the kinds of accommodations law schools provide for students with disabilities, see Stone, *supra* note 27. See also Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 34 (1997) (thorough overview of possible accommodations for students with learning disabilities).

requested accommodation would compromise the essential elements of a law school program must be determined on an individualized basis.⁶³ Examples of accommodations that have, in typical law school contexts, gone beyond reasonable ones include waiver of minimum GPA requirements,⁶⁴ waiver of class attendance requirements,⁶⁵ taking exams at home,⁶⁶ and providing an alternate format for multiple choice tests.⁶⁷ The decision whether a requested academic adjustment goes to essential academic standards is one that is given deference by both OCR⁶⁸ and the courts.

D. Enforcement

Section 504 regulations require schools to designate a Section 504 coordinator as well as to establish an internal grievance process for “prompt and equitable” resolution of disability discrimination complaints.⁶⁹ External recourse is also available. Aggrieved students may file a complaint under either Section 504 or Title II of the ADA with the OCR within 180 days of the alleged violation, or at a later time for good cause.⁷⁰ OCR investigates complaints informally (normally by an on-site visit to the school to review files and interview relevant persons, and without a hearing) and may issue an opinion letter containing a finding that disability discrimination has or has not occurred.⁷¹ Students may also file private lawsuits under both Section 504 and the ADA.⁷² Relief is normally injunctive in nature; damages are available only under limited circumstances,⁷³ and not in

63. Letter to: Cabrillo Coll., 2 NDLR 78 (OCR 1991) (“A generalized decision that . . . requirements can never be waived, without consideration of the reasons for the existence of an individual requirement, would not meet the standards set forth in Section 104.44 of the regulation.”). As another example, if a professor set a stringent attendance requirement for her class, but made exceptions for nondisability reasons, modification of the attendance requirements for that class might be a reasonable accommodation for a student with a disability.

64. Analogously, the ADA Title II Technical Assistance Manual suggests that bar examiners and other licensing authorities need not waive bar examination requirements nor minimum passing scores as accommodations. Civil Rights Division of the Department of Justice, ADA TITLE II TECHNICAL ASSISTANCE MANUAL at 14.

65. OCR has found that waiving law school attendance requirements is beyond legally required academic adjustments. Letter to: Seattle Univ. Sch. of Law, 27 NDLR 321 (OCR 2003).

66. *McGregor v. La. State Bd. of Supervisors*, 3 F.3d 850, 859–60 (5th Cir. 1993).

67. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794–95 (1st Cir. 1992).

68. Letter to: N. Ill. Univ., 7 NDLR 392 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction.”).

69. 34 C.F.R. § 104.7 (2006). These regulations do not require schools to make the grievance process available to applicants for admission. *Id.*

70. 34 C.F.R. § 100.7 (2006).

71. 29 U.S.C. § 794a(a)(2) (2000) (making procedures under Title VI available); 34 C.F.R. § 104.61 (2006).

72. 29 U.S.C. § 794a(a)(2) (2000).

73. See *id.* (Section 504); 42 U.S.C. § 12131 (2000) (ADA Title II); *id.* at § 12188 (2000) (ADA Title III). Punitive damages are not available under ADA Title II or Section 504. *Barnes v. Gorman*, 536 U.S. 181 (2002).

private lawsuits under Title III of the ADA.⁷⁴ Attorney's fees are available to prevailing plaintiffs, although recent case law developments make it more difficult to be eligible for a fee award.⁷⁵

E. The Prima Facie Case

A prima facie claim of disability discrimination in a readmissions case under Section 504 has four elements: 1) the plaintiff is a statutorily covered person with a disability, 2) she is otherwise qualified for readmission, 3) she was denied readmission solely by reason of her disability (here the student can make out a prima facie case, the school can articulate a legitimate reason for its decision, and the student can then prove pretext) and 4) the defendant school received federal education funds.⁷⁶ It does not appear that reverse disability discrimination claims are available,⁷⁷ so schools may choose to engage in affirmative action in favor of students with disabilities without fear of liability.⁷⁸

F. The IDEA's Different Approach and the Student Expectations it Creates

Most students entering law school with (or without) an impairment are familiar with the coverage and entitlements of the IDEA,⁷⁹ the federal preK-12 special education statute. Some have their own experience being served under the statute;

74. See 42 U.S.C. § 12188(b)(2) (2000).

75. 29 U.S.C. § 794a(b) (2000) (Section 504); 42 U.S.C. § 12188 (2000) (ADA). For example, in a recent Supreme Court case, the Court indicated that a private settlement of a civil rights claim was insufficiently "prevailing" to create eligibility for reimbursement of attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health Res.*, 532 U.S. 598, 605 (2001). For a discussion of this case's impact on the IDEA, see Lynn Daggett, *Special Education Attorney's Fees: of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. OF JUV. L. & POL. 1 (2004).

76. See, e.g., *Zukle v. Bd. of Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (dismissed medical student). With regard to the otherwise qualified requirement, this court announced a burden shifting framework:

[T]he plaintiff-student bears the initial burden of producing evidence that she is otherwise qualified. This burden includes the burden of producing evidence of the existence of a reasonable accommodation that would enable her to meet the educational institution's essential eligibility requirements. The burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards. The school may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards. However, the plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified.

Id. at 1047.

77. See *infra* note 322 and accompanying text.

78. At the law school where the author is a professor, the faculty recently reaffirmed its commitment in admissions to diversity by deciding to consider a number of forms of diversity in applicants, including disability. The law faculty has not decided whether to give special consideration to disability or other diversity factors in readmissions decisions.

79. See 20 U.S.C.A. § 1411 (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1411 (West Supp. 2006) (allotting funds for special education).

others (at least those in public schools) likely saw the statute at work in their schools with certain of their classmates.⁸⁰ The IDEA⁸¹ took effect with the 1978-79 school year.⁸²

The statutes are set up quite differently; the IDEA is publicly funded; Section 504 and the ADA are unfunded mandates.⁸³ The IDEA applies to public preK-12 schools;⁸⁴ as applied to higher education Section 504 and the ADA apply to both public and private schools.⁸⁵ The IDEA's approach to eligibility and substantive entitlements is markedly different than that of the higher education statutes. Understandably, law students have expectations about coverage and services in law school based on their earlier experience with the IDEA.

1. Eligibility

Under the IDEA, a diagnosis of an impairment such as a learning disability or ADD is normally sufficient to qualify for services. The IDEA defines covered students as those aged 3 to 21, who are diagnosed with one or more of a statutory list of disabilities, and who need special education instruction.⁸⁶

The IDEA's approach to eligibility involves no "substantial limitation" analysis.⁸⁷ A diagnosed student is IDEA-eligible unless she functions so well that she does not need special education instruction,⁸⁸ and no level of student

80. Disability evaluators also tend to be more familiar with and oriented to the IDEA than to the laws governing higher education students. *See supra* notes 47-48 and accompanying text.

81. 20 U.S.C.A. §§ 1401-61 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. §§ 1401-61 (West Supp. 2006).

82. The preK-12 regulations for Section 504 were modeled on and are quite similar to the IDEA. 34 C.F.R. §§ 104.31-104.38 (2006).

83. The ADA is Commerce Clause legislation. *See* 42 U.S.C. § 12101(b)(4) (2000). Section 504 is a condition on the receipt of federal education funds. *See* 29 U.S.C. § 794(a) (2000).

84. *See* 20 U.S.C.A. § 1413 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1413 (West Supp. 2006) (requirements for local educational agencies).

85. *See supra* notes 16-21 and accompanying text.

86. 20 U.S.C.A. § 1401(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1401(3) (West Supp. 2006); 20 U.S.C.A. § 1412(a)(1) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(1) (West Supp. 2006). The group of IDEA-eligible students is thus both broader and narrower than the group of higher education students covered by Section 504 and the ADA. On the one hand, Section 504 and the ADA potentially cover impairments not on the IDEA's statutory list, as well as past and perceived impairments. On the other hand, IDEA eligibility determinations are based primarily on a diagnosis, rather than the student's level of functioning, which has become primary under Section 504 and the ADA.

87. University disability services offices may similarly not do a substantial limitations analysis in reviewing an evaluation diagnosing a student with an impairment. *See* Association for Higher Education and Disability ("AHEAD") Best Practices Disability Documentation in Higher Education, *available at* <http://www.ahead.org> (last visited May 1, 2006) (referring to United Nations and other international definitions of disability but not referring to the *Toyota* average person analysis for determining whether an impairment is substantially limiting).

88. 20 U.S.C.A. § 1401(3)(ii) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1401(3)(ii) (West Supp. 2006).

functioning is too low for IDEA eligibility.⁸⁹ Thus, a gifted student with a learning disability or attention deficit disorder may well be eligible if the disability limits the student's ability to achieve her potential.⁹⁰

Schools have responsibility for identification and documentation of eligibility under the IDEA and the preK-12 Section 504 regulations; they must seek out, evaluate at school expense, and identify eligible students.⁹¹ As discussed earlier, under Section 504 and the ADA, higher education students have the burdens of identification, documentation, and requesting accommodations.⁹²

2. Protection From Punishment For Disability-Related Behavior

There is no "otherwise qualified" analysis under the IDEA limiting eligibility for students whose disabilities prevent them from meeting a school's standards. In fact, IDEA students are protected from discipline for conduct related to their disability.⁹³ An IDEA student cannot be punished, particularly in the form of suspension or expulsion, for behavior that is a manifestation of his disability.⁹⁴ While most discipline under the IDEA is nonacademic (public preK-12 schools do not academically dismiss students), this rule applies to all disciplines. In contrast, Section 504 "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap."⁹⁵

3. Substantive entitlements

In stark contrast to the "academic adjustments" required for higher education students, the IDEA (as well as the substantive Section 504 provisions for preK-12 public school students) establishes a right to a "free appropriate public

89. See, e.g., *Timothy W. v. Rochester, N.H., Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (IDEA is a zero-reject statute; profoundly retarded and multiply handicapped student whom school's experts opine has no functioning cerebral cortex and thus cannot engage in higher order thinking is eligible under the IDEA).

90. See, e.g., *W. Chester Area Sch. Dist. v. Bruce & Suzanne C.*, 194 F. Supp. 2d 417 (E.D. Pa. 2002) (involving ADD student with high verbal IQ and much lower reading, spelling and math reasoning skills who is earning passing but not excellent grades is IDEA-eligible).

The typical evaluation approach for diagnosing learning disabilities under the IDEA requires a significant gap between the individual student's intellectual ability (normally via an IQ test) with the person's measured achievement. 34 C.F.R. § 300.541(a)(2) (2006). See Eichhorn, *supra* note 62, at 34 (providing a thorough overview of diagnosis, nature, and possible accommodations for students with learning disabilities).

91. 20 U.S.C.A. § 1412(a)(3) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(3) (West Supp. 2006) (IDEA); 34 C.F.R. § 104.32 (2006) (Section 504 preK-12 public school regulations).

92. See *supra* note 56 and accompanying text.

93. 20 U.S.C.A. § 1415(k) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(k) (West Supp. 2006).

94. *Id.* at § 1415(k)(4)-(5) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(k)(4)-(5) (West Supp. 2006); see also *Honig v. Doe*, 484 U.S. 305 (1986).

95. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988).

education”⁹⁶ (“FAPE”) in the “least restrictive environment.”⁹⁷ Under the IDEA these obligations are met by having a team of persons, including the parents, prepare an Individual Education Program (“IEP”) for the student, in order to ensure that the student received the FAPE to which each IDEA-covered student is statutorily entitled. IEPs often include extensive personal instructional and other services such as speech and language therapy, occupational and physical therapy, and counseling, tutoring and personal aides, and sometimes even placement in a private school at the public school’s expense.⁹⁸ This experience creates expectations about eligibility and levels of required services in higher education which are at odds with what the federal disability discrimination statutes actually offer to higher education students.⁹⁹

4. Enforcement

Perhaps in part because of mistrust of schools based on their past failings in dealing with preK-12 students with disabilities, Congress chose to set up an elaborate, adversarial system in the IDEA for parents to challenge schools’ judgments.¹⁰⁰ This dispute resolution system includes an administrative hearing process for IDEA complaints presided over by impartial hearing officers trained in both law and special education.¹⁰¹ Courts hearing IDEA cases do so somewhat in the manner of hearing an administrative appeal of the hearing officer’s decision, receiving the record and decision from the administrative hearing, although in contrast to administrative appeals, courts hearing IDEA cases may take additional evidence.¹⁰² While money damages are generally not available for IDEA violations, attorney’s fees are available to prevailing parents.¹⁰³

5. Impact of the IDEA on law student perspectives

Law students, including those who participated in the IDEA, performed well enough academically to go on to enroll in and graduate from college, and did well enough there and on the LSAT to be accepted to law school. Acceptance to law

96. 34 C.F.R. § 104.33(a) (2005) (Section 504); 20 U.S.C.A. § 1412(a)(1) (2005) (IDEA).

97. 20 U.S.C. § 1412(a)(5) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(5) (West Supp. 2006) (IDEA); 34 C.F.R. § 104.34(a) (2005) (Section 504).

98. *See* 34 C.F.R. § 300.24 (2005) (defining related services to include various therapies and counseling); 20 U.S.C.A. § 1412(a)(10) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(10) (West Supp. 2006) (relating to placement in private schools).

99. Between their IDEA years and law school, students have been to college, where they have had experience with the reduced entitlements of higher education students with disabilities.

100. *See generally* 20 U.S.C.A. § 1415 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415 (West Supp. 2006). States must make a complaint process available, as well as mediation and administrative hearings.

101. 20 U.S.C. § 1415(f)(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(f)(3) (West Supp. 2006).

102. 20 U.S.C.A. § 1415(i)(2)(C) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(i)(2)(C) (West Supp. 2006).

103. 20 U.S.C.A. § 1415(i)(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(i)(3) (West Supp. 2006).

school conveys to prospective law students that they have the ability to succeed in law school,¹⁰⁴ although law faculty are well aware that not everyone, including some very bright persons, can master the unusual mode of analysis, often referred to as “thinking like a lawyer,” that is at the heart of lawyering.

Such students enter law school with a history of academic success, some with significant support under the IDEA, and a belief that they will continue to succeed. Once in law school, the amount and level of work is significantly higher than most have encountered before, but for those with impairments, the level of support is much lower than before. Some students who were served under the IDEA in fact will not be persons with a disability under Section 504 and the ADA, perhaps because they did not self-identify and document an impairment, or perhaps because the impairment, with mitigators, does not substantially limit a major life activity and thus does not amount to a statutory disability. A number of such students are bright enough to have succeeded prior to law school without any participation in special education or accommodations. For law students who are covered by the federal disability discrimination statutes, the accommodations offered are often much more meager than the services provided under their IDEA IEP.

It is likely that at no point in their preK-12 education has such a student’s impairment been a barrier to academic participation, since the IDEA is a zero-reject statute, and special statutory rules prohibit discipline for behavior related to the student’s disability. Moreover, the vague higher education statutory language about what is required in terms of academic adjustments/accommodations, in concert with the kinds of services that were available under the IDEA, may cause frustration on the student’s part that assistance perceived to be both necessary and legally required is not being provided by the law school. Other students who have never been served or diagnosed as a person with a disability find themselves struggling, paying for an expert evaluation, and being told by the expert that they have a “disability” that has contributed to their current academic struggles. These students may well assume that the diagnosed “disability” means they are entitled to extensive services under disability laws.

When law students do not earn the minimum GPA required by the law school and are dismissed, it is devastating. Most students have taken out significant loans to finance their education.¹⁰⁵ Of course, most unhappily for the student, the dismissal means they likely will not have a career as an attorney.¹⁰⁶ Requesting

104. Law school accreditation standards limit law schools to admitting students the school believes will be academically successful. *See infra* Section VII.A.2.

105. *Cf.* Milam & Marshall, *infra* note 107, at 335 n.4 (noting that most dismissal litigation involves medical schools because of “financial investment and potential loss”).

106. *Id.* at 347 (“Presumably, students who have invested substantial time and money in a graduate or professional program, and who exhibit academic inadequacies throughout their enrollment are most likely to sue universities for academic dismissals. Such students expect to complete their education and practice their chosen profession. Indeed, the school has allowed them to continue their education in the belief that they will receive a degree. The university’s refusal to allow them to continue or to award a degree often results in litigation. On the other hand, the academically inadequate student whom the university dismisses from the program early does not have the same emotional, financial and personal investment . . . [and] is less likely to

new or different accommodations for an impairment than what they received from the law school in the past, whether the impairment is one the student has known about or is newly diagnosed as part of the readmissions process, perhaps accompanied by an evaluator's prediction of success if the accommodations are provided, offers dismissed students a concrete basis for their belief that they will be successful if readmitted. It also provides a legal basis for challenging the school's decision if it is not in their favor. However, as Parts IV and V of the article explain, in the vast majority of cases, students pursuing such claims will not get past summary judgment, as the court will defer to their school's academic judgment that the student should not be readmitted.

IV. JUDICIAL DEFERENCE TO ACADEMIC DECISIONS BY HIGHER EDUCATION AUTHORITIES

There is a tradition of Supreme Court deference to higher education authorities' academic judgments.¹⁰⁷ This tradition spans several decades and was recently reaffirmed in the University of Michigan affirmative action cases. Although the Court has not yet specifically heard a case in which a dismissed student made a disability discrimination claim, this deference has been extended to academic judgments even in the contexts of constitutional claims,¹⁰⁸ and disability¹⁰⁹ and

initiate a lawsuit.”) *Id.* In the author's experience, dismissed students rarely believe they are not capable of succeeding, if they are offered another chance.

107. For more thorough overviews of deference to higher education decisions than this article affords, see Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (comparing the lack of deference under the IDEA with the deference accorded universities, and arguing that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments); Steven D. Milam & Rebecca D. Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987); Edward Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 614 (2004). For a discussion of lower court deference to academic dismissal decisions not involving disability, see K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175, 196-99 (2003).

108. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding law school's race conscious admissions program was not unconstitutional race discrimination; announcing deference to law school faculty's judgment that a diverse student body was educationally desirable); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (rejecting due process claims of student who had failed the Boards Step 1 exam taken after the fourth year of his school's special six year B.A.-M.D. program); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (rejecting procedural and substantive due process claims by a medical school student who had been academically dismissed for unsatisfactory work in her clinical rotations).

109. See *Cnty. Coll. v. Davis*, 442 U.S. 397 (1979) (rejecting Section 504 claim by a student who was denied admission to a nursing program squarely because of her severe hearing impairment; agreeing with the school that this impairment prevented her from successfully and safely participating in the clinical portion of her training, as well as being successful in nursing positions such as those in the operating room or ICU where doctors and nurses are masked, and thus made her not "otherwise qualified" for admission).

other¹¹⁰ discrimination claims, as well as claims by academically dismissed students.¹¹¹ There is thus every indication that the Court would offer the same deference to a readmissions decision in the context of a disability discrimination claim.

In these cases, the Court has noted several underlying bases for deferring to academic dismissal decisions: they require “expert evaluation of cumulative information,”¹¹² they are subjective and thus unsuitable for close judicial review,¹¹³ judicial second-guessing could harm the faculty student relationship,¹¹⁴ and the educators who make these decisions normally do so on the basis of extensive observation/other personal knowledge of the student’s abilities and achievements.¹¹⁵ The Court has also noted that concerns of federalism¹¹⁶ and academic freedom¹¹⁷ also counsel judicial deference.

These cases also offer insight into the triggers for and scope of the Court’s deference. In several cases (*Horowitz* and *Ewing*, as well as the faculty-established admissions standards in *Grutter*), the Court has noted the school’s careful decision-making process,¹¹⁸ suggesting that such care is a condition for judicial deference. In *Ewing*, the Court rejected the student’s attempt to use pattern evidence (i.e. pointing to allegedly dissimilar treatment of other students) as a basis for not deferring to the school’s judgment to dismiss him.¹¹⁹ The *Grutter* Court seemed to

110. *Grutter*, 539 U.S. at 317 (rejecting race discrimination claims under the Constitution and Title VI).

111. *See, e.g., Ewing*, 474 U.S. 214 (1985); *Horowitz*, 435 U.S. 78 (1978).

112. *Horowitz*, 435 U.S. at 90.

113. *Id.*

114. *Id.* (noting that “[t]he educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, ‘one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute.’” (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting))).

115. *Ewing*, 474 U.S. at 228.

116. *Id.* at 229–30 (Powell, J., concurring).

117. *Id.* at 226 n.12. For an overview and history of the case law on academic freedom, see Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

One commentator notes that the disability discrimination statutes seem to be drafted and interpreted to protect academic freedom because of the limits on prohibited discrimination such as the otherwise qualified requirement and the idea that reasonable accommodations do not include those which alter a school’s academic standards. He suggests that without these limitations, or if disability-based affirmative action were required, academic freedom would be impaired. James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 55–57 (1996).

118. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (referring to the detailed admissions policy written and approved by the law school faculty); *Ewing*, 474 U.S. at 216 (noting that the decision was made by a committee “[a]fter considering [the] record in some detail”); *Horowitz*, 435 U.S. at 85 (noting the “careful and deliberate” decision, which was made by a faculty committee and reviewed by the full faculty and administration).

119. *Ewing*, 474 U.S. at 227–28. With the school’s pattern and practice of allowing students a second opportunity to pass the Boards, even some students with many incomplete or low grades, the *Ewing* Court found that while “it may well have been unwise to deny Ewing a second chance,” dismissing him was “not beyond the pale of reasoned academic decision-making when

find it significant that the full faculty approved the admissions standards in question.¹²⁰ In all of the cases the decisions were made by a faculty committee or by the full faculty, rather than administrators or other officials such as the admissions officials who established the point-based undergraduate admissions found by the Court in a companion case to *Grutter* to amount to unconstitutional race discrimination.¹²¹ The Court consistently noted with apparent approval the use of context and personal knowledge to make the decisions: the students' entire academic records in *Horowitz*, *Ewing*, and *Davis*, the school's experience educating the students in *Horowitz* and *Ewing*, and the needs of the law school and society in *Grutter*. Finally, the Court appeared willing to characterize "academic" decisions and the considerations which underlie them and thus merit deference broadly: the attendance and hygiene concerns in *Horowitz*,¹²² determining that handling stress, judgment, self-discipline, and setting priorities were important qualifications for successful practice as a physician in *Ewing*,¹²³ safety considerations in *Davis*,¹²⁴ and preparing future leaders of society and breaking down racial stereotypes in *Grutter*.¹²⁵

Not surprisingly, lower courts have followed the Supreme Court's lead and deferred in most cases to the academic decisions of higher education faculty, including disability-related academic decisions. Commentators reviewing these decisions offer a variety of reasons for this deference, including academic freedom,

viewed against the background of his entire career at the University." *Id.* at 227–28 (noting that a second attempt at the Boards might have averted the litigation).

120. *Grutter*, 539 U.S. at 315–16.

121. *Gratz v. Bollinger*, 539 U.S. 244, 253 (2003) (noting that the undergraduate admissions policy was promulgated by University admissions officers rather than academics, and did not rest on any specifically identified educational basis, and thus was not owed deference). One commentator aptly sums up the *Gratz* majority opinion as holding that the "undergraduate college's reliance on one single factor—race—was not the exercise of careful and deliberate educational judgment to which the judicial process might defer." Stoner & Showalter, *supra* note 107, at 614. "[T]here will be judicial deference to careful and deliberate educationally informed decision-making on campus but not to decisions in which educational judgment is not used." *Id.* at 615. This commentator contrasts the *Grutter* Law School's "multifaceted, individualized analysis of every candidate, in which the [Admissions] committee was allowed to rely on its years of experience to conduct a highly complex task" with the automatic point awards at the undergraduate level which "did not require application of any educational judgment." *Id.* at 615–16.

122. 435 U.S. at 81. As one commentator has noted, the dismissal in *Horowitz* may thus be characterized as less than purely academic, but the Court still found the decision was owed deference. Fernand Dutille, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 626–27 (2003) (noting that despite Supreme Court statements to the contrary in fact there is no bright line between academic and nonacademic bases for punishment; for example, the commentator asks whether a grade of F in a course for either not meeting attendance requirements or for cheating, causing a student's GPA to fall below the required minimum, is really an academic dismissal; suggesting that at least rudimentary due process be extended to academic decisions and that deference to nonacademic decisions is sometimes appropriate).

123. 474 U.S. at 228 n.13.

124. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 n.12 (1979).

125. 539 U.S. at 330–32.

courts' lack of expertise in academic matters, the inherent subjectivity of such decisions, the special, nonadversarial relationship between university and student, and perhaps the idea that universities are a "separate realm" whose working is not well understood by courts.¹²⁶ Review of these lower court decisions also reveals patterns: courts hearing student challenges to school academic decisions tend to defer if 1) the school used and adhered to fair processes to make its decision, including some articulated basis for the decision, 2) there is a reasonable or rational basis for the decision, and 3) there is no evidence of bad faith by the school.¹²⁷

V. ACADEMIC DISMISSAL READMISSIONS CASES AND OCR OPINION LETTERS¹²⁸

A. Law School Readmissions Process and Standards

1. Academic dismissal criteria

Law schools are governed primarily by their faculty,¹²⁹ which operate by majority vote. By vote of the faculty, law schools typically enact academic rules requiring students to maintain a minimum cumulative GPA. While the establishment of a minimum GPA is a discretionary decision, its application to specific students is objective and ministerial: students who do not achieve the minimum GPA are dismissed from the law school and are no longer enrolled students. Dismissals most often occur at the end of the first year of law school.

126. Leonard, *supra* note 117, at 57–60 (explaining basis of doctrine of academic abstention).

127. *See generally* Dupre, *supra* note 107 (discussing deference specifically in the context of disability claims); Dutile, *supra* note 122, at 643–48; Leonard, *supra* note 117 (involving an extended discussion of deference in the context of disability claims); Milam & Marshall, *supra* note 107.

128. This article examines disability discrimination claims in the context of readmissions requests by students who have been dismissed for academic reasons (i.e. failure to maintain minimum required grades). Discussion of disability discrimination claims by students dismissed for nonacademic reasons (e.g. misconduct) is beyond the scope of this article. For examples of such nonacademic claims, however, see Letter to: Gonzaga University, 27 NDLR 286 (OCR 2003) (university did not engage in disability discrimination when it permanently suspended law student with history of mental illness for "continued threatening and harassing behavior," including "harassing and threatening telephone calls to . . . faculty and other students," "impersonation of another student" and "threats of bodily harm" which violated university conduct code); Letter to: University of Idaho, 13 NDLR 127 (OCR 1998) (finding no disability discrimination where student with emotional, cognitive, and physical disabilities was suspended for one year for failing to disclose criminal history on his application, and penalty for nondisclosure was not inconsistent with discipline imposed on students without disabilities). These OCR opinions suggest that where the student is dismissed for violating some general conduct rule which is applied consistently to all students, with or without disabilities, and where the school considers disability information as appropriate in applying the rule (for example, in addressing relevant state-of-mind issues), it appears that nonacademic discipline does not violate disability discrimination laws.

129. *See infra* notes 348–350 and accompanying text.

Because the actual dismissal “decision” is normally a ministerial one based on a student’s failure to achieve a disability-neutral minimum GPA standard, there is generally no plausible basis for a student with a disability to challenge her dismissal as discriminatory.¹³⁰

2. Readmissions process and criteria

Many law schools offer academically dismissed students a chance to petition in writing to be readmitted to the law school, with supporting documentation of the student’s choosing.¹³¹ Other law schools provide no opportunity to dismissed students to apply for readmission, at least if their GPA falls below a certain level.¹³² The process and standards for readmission are generally established in an academic rule enacted by vote of the law school’s faculty.¹³³ Usually, a faculty committee reviews readmissions applications and other relevant information such as the student’s entering LSAT and GPA credentials, and seeks comments from the student’s teachers. Generally, there is not a formal hearing but the student has a chance to appear before the committee in order to make a statement and/or to answer questions from committee members. The law school faculty may delegate the power to make readmissions decisions to this committee, or the committee may prepare a recommendation for a full faculty vote.

Standards for readmission generally center on two issues: 1) whether the student’s failure was for a good reason or due to “extraordinary circumstances,” which will no longer be an obstacle to the student’s success, and 2) whether the student will be successful if she is readmitted. The student typically has the burden of proving she meets the readmission standard. In contrast to the actual

130. Of course, if a law school sometimes waived minimum GPA requirements and did not actually dismiss all students who did not earn the minimum required GPA, a student with a disability could claim discrimination if that same law school refused to waive the GPA requirement and dismissed her. *Cf.* Letter to: Cent. Carolina Cmty. Coll., 31 NDLR 78 (OCR 2005) (determining veterinary technician program followed its own policy of not permitting more than one readmission to any dismissed student; finding no discrimination against dismissed student with disability who was refused a second readmission).

131. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 739 (7th Cir. 1988); *Scott v. W. State Univ. Coll. of Law*, 112 F.3d 517, No. 96-56088, 1997 WL 207599, at *1 (9th Cir. 1997) (table) (unpublished decision); *Marlon v. W. New England Coll.*, No. Civ.A. 01-12199DPW, 2003 WL 22914304 at *2-3 (D. Mass. Dec. 9, 2003) (awarding summary judgment to the law school), *aff’d*, 29 NDLR 139 (1st Cir. 2005); *Allison v. Howard Univ.*, 209 F. Supp. 2d 55, 63 (D.D.C. 2002) (dealing with student who submitted five readmissions petitions); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 852-55 (D.N.H. 1995); *Aloia v. N.Y. Law Sch.*, No. 88 CIV 3184 (CSH), 1988 WL 80236 (S.D.N.Y. July 27, 1988).

132. *See, e.g.*, Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003) (finding no discrimination by school without a readmissions process); Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (2.0 minimum GPA; students below 1.8 have no opportunity to petition for readmission); *cf. McGregor v. La. State Univ.*, 3 F.3d 850, 855-56 (5th Cir. 1993) (school rule requiring dismissed students to sit out a year); Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998) (same).

133. *See, e.g.*, Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (noting, as one of the reasons to defer to the school’s readmission judgment, that the school’s rules concerning minimum GPAs were recommended by a faculty committee and adopted by the full faculty).

dismissal, application of these readmissions standards involves discretion. Consequently, students can and have claimed that their law school's readmissions standard has been applied to them in a discriminatory way.

B. Court Cases Addressing Disability Discrimination Claims By Academically Dismissed Law Students

Eight¹³⁴ published opinions involve academically dismissed law students denied readmission claiming disability discrimination under federal statutes. Each of these eight cases reached identical procedural results: summary judgment for the school,¹³⁵ affirmed by the First, Fifth, Seventh, and Ninth Circuits in each of the appealed cases.

The cases make it clear that a disability discrimination complaint does not provide an opportunity to review the merits of a law school's decision not to readmit a student who has been dismissed for academic failure. Anti-discrimination laws such as Section 504 do not guarantee correct decisions about persons with disabilities. What they do require is a decision which is not the result of illegal discrimination. This is especially true in the context of a school's academic judgments about a student, a context in which the Seventh Circuit notes, in *Anderson v. University of Wisconsin*, that "[t]he Supreme Court has repeatedly admonished courts to respect the academic judgments of university faculties."¹³⁶

134. *Murphy*, 56 F.3d 59; *McGregor*, 3 F.3d 850; *Anderson*, 841 F.2d 737; *Scott*, 1997 WL 207599; *Marlon*, 2003 WL 22914304; *Allison*, 209 F. Supp. 2d 55; *Gill*, 899 F. Supp. 850; *Aloia*, 1988 WL 80236. For another case brought by a law student with an alleged disability who had been dismissed twice, but was offered readmission, see *Colombini v. Members of the Bd. of Dirs. of the Empire Coll. Sch. of Law*, No. C9704500CR, 2001 WL 1006785 (N.D. Cal. Aug. 17, 2001) (granting summary judgment to the school). In this case, the school and the student disagreed over the precise accommodations the school would offer to the student, but the student did reenroll and eventually graduated. *Id.* The court in this case found insufficient evidence that the student had a disability; he presented the school with letters from a psychiatrist referring to an unspecified disability. *Id.* He refused to get a second opinion at the school's expense, and he offered no evidence of failure to provide reasonable accommodations or other discrimination. *Id.* at *1, *6-7.

135. See also *Robinson v. Hamline Univ.*, No. C4-93-20741994, 1994 WL 175019 (Minn. Ct. App. May 10, 1994) (affirming summary judgment for law school in case brought by dismissed law student under state discrimination law modeled after Section 504).

136. *Anderson*, 841 F.2d at 741 (citing *Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (rejecting claim by academically dismissed student); *Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (rejecting claim by academically dismissed medical school student)). For another case where a court announced a policy of deference to a law school's readmission decision and affirmed a summary judgment for the school, see *Hash v. Univ. of Ky.*, 138 S.W.3d 123, 127-28 (Ky. Ct. App. 2004) (citing *Anderson*, *Horowitz*, and *Ewing*) (involving a student with a disability who voluntarily withdrew from first semester of law school before taking exams because of depression and then was denied readmission in part because of references in his application materials to a mentally ill law student who went on a shooting spree); *id.* at 126 n.4 (noting that "a law school is entitled to consider a candidate's psychological and emotional problems, as any mental impairment may be relevant to the . . . ability to cope with the stresses of law school, . . . to deal with constant pressures from other students and professors, and to withstand the demands associated with classroom attendance and participation"); *id.* at 129 n.11 (illustrating that where a student that has not requested accommodations, a school's failure to provide accommodations

In *Anderson*, a law student who had been academically dismissed filed several claims, including disability discrimination. The student was an alcoholic¹³⁷ with a troubled academic history,¹³⁸ which included an incident in which he “harassed and threatened his legal writing partner” while drunk and earned a D in that course.¹³⁹ The student petitioned for readmission to a committee, claiming drinking had caused his academic failure and that he was now in recovery. The committee denied the petition, finding that he still drank, he was not prepared for the stress of law school, and he would not succeed if readmitted.¹⁴⁰

The Seventh Circuit found the student not otherwise qualified because his grades did not meet the school’s required standards, although that failure may have been directly caused by the alcoholism disability.¹⁴¹ The court found no evidence of discrimination even though other students with somewhat lower grades had been readmitted, the student’s grades were quite close to the required minimum,¹⁴² and in spite of an opinion offered by the student’s counselor that the student could now handle law school.¹⁴³

The court framed the issue before it:

The question is not whether a court believes that [the student] could handle the work. It is whether the University discriminated against him because of his handicap – that is, excluded him even though it would have readmitted a student whose academic performance and prospects were as poor but whose difficulties did not stem from a “handicap”. . . . [T]he Rehabilitation Act requires only a stereotype-free assessment of the person’s abilities and prospects rather than a correct decision.¹⁴⁴

Applying this standard, and in spite of the counselor’s opinion, the appeals court affirmed a summary judgment for the school. The court explained that “[n]othing in the record suggests that the University’s decision was based on stereotypes about [the student’s disability] as opposed to honest judgments about how [the student] had performed in fact and could be expected to perform.”¹⁴⁵

does not violate the law).

137. *Anderson*, 841 F.2d at 739. The school did not contest the student’s assertion that he was a statutorily covered person with a disability by reason of his alcoholism, although no accommodations were requested. *Id.*

138. *Id.* His first semester grades were below the required average. *Id.* Moreover, he had not documented receipt of an undergraduate degree, and was not allowed to finish his first year. *Id.* He was allowed to return the next year, and then to withdraw. The next year he again reenrolled, earned grades below the required minimum, and was dismissed. *Id.*

139. *Id.*

140. *Id.* The student grieved the denial to a different committee, which also declined to readmit him. *Id.*

141. *Id.* at 740 (citing *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979)).

142. *Id.*

143. *Id.* at 741.

144. *Id.* at 741 (footnote and citations omitted). The court noted that the school had allowed the student to re-enroll several times and to take courses in its business school. *Id.* It also considered his drinking and subsequent misconduct toward a classmate as evidence of a lack of hostility toward the student. *Id.*

145. *Id.*

The court also noted that “[n]ot a shred of evidence in the record suggests that the University held a stereotypical view of [the student’s disability]. The committees and the Vice Chancellor looked, hard, at what [the student] had done and could do.”¹⁴⁶

The court specifically rejected the student’s claim that a jury should hear the matter and hopefully agree with the student’s counselor’s assessment that the student could now be successful in law school:

The [Rehabilitation] Act does not designate a jury, rather than the faculty of the Law School, to decide whether a would-be student is up to snuff. The Law School may set standards for itself, and jurors unacquainted with the academic program of a law school could not make the readmissions decision more accurately than the faculty of the Law School; the process of litigation would change the substantive standard in addition to raising the costs of litigation.¹⁴⁷

The court concluded that “[l]aw schools may consider academic prospects and sobriety when deciding whether an applicant is entitled to a scarce opportunity for an education. At all events, the University acted on the basis of Anderson’s performance rather than his condition.”¹⁴⁸

*Allison v. Howard University*¹⁴⁹ involved the unfortunate situation of a law student dismissed at the end of his third year, presumably after investing much time and money in a legal career, after failing a twelve-credit clinical course.¹⁵⁰ Various law school committees rejected an appeal of the clinic grade and five readmissions petitions.¹⁵¹ In his readmissions petitions, the student informed the law school for the first time that he had a disability, “temporary emotional distress,” beginning in the fall of his third year.¹⁵² The court granted summary judgment to the school and other defendants on all claims.¹⁵³ As to the Section 504 claim, the court found that the student “likely would have serious difficulty” proving that he was a covered person with a disability and that he was otherwise qualified for readmission.¹⁵⁴ The court also found “not even a scintilla of

146. *Id.* at 742.

147. *Id.* at 741. *See also Scott*, 1997 WL 207599 (affirming summary judgment for law school where dismissed student claimed disability discrimination; student who had been dismissed for academic failure was not otherwise qualified, and student did not even assert a disability in initial request for readmission).

148. *Id.* at 742.

149. 209 F. Supp. 2d 55 (D.D.C. 2002).

150. *Id.* at 57–58. The student had also done poorly in other courses. *Id.* at 58 (noting the D’s in three courses in the first semester of law school and a failing grade in Legal Writing III).

151. *Id.* at 58.

152. *Id.* It is unclear whether the student provided documentation of his condition or merely asserted it.

153. *Id.* at 63. The student sued the law school and the clinic professor who failed him, claiming they violated Section 504 by not readmitting him and by not offering reasonable accommodations. He also asserted constitutional and state law tort and contract claims. *Id.* at 56–57.

154. *Id.* at 63.

evidence” that the student’s readmissions petitions were denied solely by reason of his alleged disability, finding instead, citing *Anderson*, that the student was denied readmission because of his academic performance.¹⁵⁵ In granting summary judgment on the claim that failure to offer accommodations and to change the clinic grade amounted to breach of contract, the court cited *Horowitz* and *Anderson* and announced it would defer to the law school’s judgments.¹⁵⁶

In *Gill v. Franklin Pierce Law Center*,¹⁵⁷ another third year law student was dismissed after receiving poor grades. The student petitioned for readmission to a faculty committee, which denied it, as did the full faculty on appeal, citing lack of ability to succeed and an inadequate plan¹⁵⁸ to address the cause of the failure.¹⁵⁹ The student sued under Section 504, noting that on his application’s personal statement he reported that he was an adult child of an alcoholic.¹⁶⁰ The court granted the school’s motion for summary judgment.¹⁶¹ It also found no evidence that the student was otherwise qualified for readmission because he did not meet the ability-to-succeed readmission standard.¹⁶² Citing cases involving dismissed medical students, the court also found that students with disabilities’ ability to succeed if readmitted should be predicted assuming the provision of reasonable accommodations, so long as “the student . . . put . . . the school on notice of his handicap by making ‘a sufficiently and specific request for accommodations.’”¹⁶³ In another case involving the same law school, the First Circuit affirmed a summary judgment for the school in a case brought by a dismissed law student with diplopia, a vision impairment, finding no evidence that the decision to dismiss was based on disability discrimination rather than the stated reason that the student “lacked the analytic skills” necessary for law school success.¹⁶⁴

In *Scott v. Western State University College of Law*,¹⁶⁵ the Ninth Circuit

155. *Id.*

156. *Id.*

157. 899 F. Supp. 850 (D.N.H. 1995).

158. *Id.* at 854–55. The student’s plan included quitting his part-time employment, a change in diet, a study schedule, and “medita[tion] . . . to overcome my anger at whatever institutional deficiencies I see at [the law school].” *Id.* at 855.

159. *Id.* at 852. The Committee’s denial also noted other problems, from failure to timely respond to the committee’s questions to noncompliance with various law school rules. *Id.*

160. *Id.* at 851, 855. The student claimed he disclosed that he suffered from post traumatic stress syndrome on his statement, but the court’s review of the statement indicated otherwise. *Id.* at 855–56.

161. *Id.* at 857. The student was proceeding *pro se* and did not file a response to the school’s motion. The school did not dispute, for purposes of its motion, the first element of the prima facie case—the student was a covered person with a disability. *Id.* Under current law, the school would appear to have had a strong argument that the student did not have a statutory disability.

162. *Id.* at 855.

163. *Id.* at 855 (citing *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1381 (3d Cir. 1991)). The court found that the disclosure on the student’s application’s personal statement was insufficient to meet this standard. *Id.* at 855–56.

164. *Murphy v. Franklin Pierce Law Ctr.*, 56 F.3d 59 (1st Cir. 1995).

165. 112 F.3d 517, No. 96-56088, 1997 WL 207599 (9th Cir. 1997) (table) (unpublished decision).

affirmed summary judgment for the law school on an academically dismissed first year law student's Section 504 and ADA Title III claims.¹⁶⁶ The student claimed a disability for the first time in his application for readmission.¹⁶⁷ The court found that the student's academic dismissal rendered him unqualified.¹⁶⁸ Moreover, since the school had no knowledge of the alleged disability when it dismissed him, the court found that the dismissal could not have resulted from disability discrimination.¹⁶⁹ The student requested accommodations not specified in the opinion; the court found that accommodations would not be required since they would require the school to "lower or substantially modify [its] standards."¹⁷⁰

The most recent of this group of cases is *Marlon v. Western New England College*.¹⁷¹ In *Marlon*, a dismissed student was granted readmission and accommodations consisting of a reduced course load, note-taking, taped classes, and extra time for and typing of exams for newly disclosed disabilities of carpal tunnel syndrome, anxiety, depression, and panic attacks.¹⁷² Despite the accommodations and taking classes for the second time, the student again failed to earn the required grades.¹⁷³ She then obtained a diagnosis of a learning disability and requested additional accommodations, but this time was denied readmission, and sued.¹⁷⁴ As discussed earlier in this article, the court found that the student was not a covered person with a disability under the federal statutes.¹⁷⁵ The *Marlon* court also noted that the school was not on notice of the learning disability until after the student had been dismissed for the second time, and thus, it could not be the basis for illegal discrimination.¹⁷⁶ Finally, responding to the student's claim that the school regarded her as having a disability because it received a letter stating she had a disability and needed accommodations, the court found that "[t]he mere fact that an ADA defendant makes an accommodation is not evidence that it regarded the plaintiff as having a disability."¹⁷⁷

166. *Id.* at *2.

167. *Id.* at *1.

168. *Id.*

169. *Id.* The court's reasoning is unconvincing here; the claim centered on the denial of readmission rather than the ministerial "decision" to dismiss, and the school did have notice of the claimed disability when it denied readmission.

170. *Id.*

171. No. Civ.A. 01-12199DPW, 2003 WL 22914304 (D. Mass. Dec. 9, 2003) (awarding summary judgment to the law school), *aff'd*, 29 NDLR 139 (1st Cir. 2005).

172. *Id.* at *1-2.

173. *Id.*

174. *Id.* at *2-3. She made claims under Section 504, the ADA, and state discrimination laws, asserting in part that the school failed to effectively implement her accommodations. *Id.* at *4-5.

175. *Id.* at *7. *See supra* note 44 and accompanying text. The court did not reach the issue of the implementation of the accommodations for the student.

176. *Id.* at *8 & n.18. As in *Scott*, the court's reasoning is questionable here; the claim involved the denial of readmission, not the academic dismissal. Again, the school had notice of the claimed disability when it denied readmission.

177. *Id.* at *9 (citing employment cases so holding). The court also noted that the letter, from the school's disability services office, did not find and did not make a determination that the

Like *Anderson, McGregor v. Louisiana State University*¹⁷⁸ is a case in which a federal appeals court, this time the Fifth Circuit, announced a policy of deference to a law school's readmission decision. In *McGregor*, a student with neurological and spine injuries causing fatigue and pain received some accommodations from the law school but was denied others, and had continuing academic difficulty in his first year.¹⁷⁹ The next year, the student received additional accommodations as he was now wheelchair-bound, but in the spring was denied the accommodation of taking his exams at home, and again had academic difficulty.¹⁸⁰ He was offered readmission again to retake his spring 1L classes, despite requesting advanced standing, a part-time schedule, and taking his exams at home as accommodations.¹⁸¹

The Fifth Circuit affirmed summary judgment on all claims for the school.¹⁸² The court found that the accommodations requested (as well as some of the accommodations the school agreed to provide) went beyond those which were legally required and would work to alter the school's standards, specifically mentioning the school's academic decision to require full-time status.¹⁸³ The court held that "absent evidence of discriminatory intent or disparate impact, we must accord reasonable deference to the Law Center's academic decisions."¹⁸⁴ Finding no evidence of discriminatory intent, the court deferred to the school's academic decisions to require full-time status and to require that exams be taken in class, decisions that were based in part on maintaining equity among students.¹⁸⁵ The student was found not to be otherwise qualified for retention because he could not meet the school's academic standards with reasonable accommodations.¹⁸⁶

student was a statutorily covered person with a disability. *Id.* at *10.

178. 3 F.3d 850 (5th Cir. 1993).

179. *Id.* at 854–58. The school provided the student with a special parking permit and extra time on an exam but denied the student part time status as an accommodation, as the school had made an academic judgment that all first year students must be full-time. *Id.* at 854–55, 858. The student did not earn the required minimum grades in his first semester. *Id.* at 855. Nonetheless, the school allowed him to audit two classes in the spring and provided individual tutoring, and he earned passing grades. *Id.* Despite the school's rule requiring dismissed students to wait a year, he was readmitted for the next fall as a full-time probationary first year student. *Id.* at 855–56. The school's admissions and academic policies at the time resulted in a high student attrition rate. *Id.* at 854 n.3.

180. *Id.* at 856. His grades were passing in the fall but below passing in the spring. *Id.*

181. *Id.* at 857. The student and school could not agree, and the student sued not only the school, but each of the faculty committee members personally asserting Section 504, ADA, constitutional and state law claims. *Id.* at 857, 862–67.

182. *Id.* at 868.

183. *Id.* at 859–60. The court noted that not requiring alteration of academic standards reflected Section 504's balancing of the school's right to set its own academic standards and the right of students with disabilities to be free from discrimination. *Id.* at 858 (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)).

184. *Id.* at 859 (citations omitted). The court assigned to the student the burden of demonstrating that his requested accommodations were reasonable. *Id.* at 859 n.11.

185. *Id.* at 859–60.

186. *Id.* at 860.

Finally, *Aloia v. New York Law School*¹⁸⁷ involved a third year student dismissed for low grades whose petition for readmission and request for reconsideration were denied.¹⁸⁸ The student then submitted a letter from his doctor indicating that he had central nervous system metabolic disorder.¹⁸⁹ The school again reconsidered the case and offered to allow the student to reenroll at a later time, if he supplied medical documentation that the condition was sufficiently under control so as to allow him to resume his studies.¹⁹⁰ The court initially granted a preliminary injunction allowing the student to reenroll and take exams immediately.¹⁹¹ Ultimately, however, the court granted summary judgment for the school. The court held that it would defer to the school's decision,¹⁹² and rejected the student's attempt to prove discrimination by comparing the treatment of his petition with those of other dismissed students.¹⁹³ The court also found that the school was entitled to find the student's medical documentation insufficient and require a medical statement that his condition was sufficiently under control so that he could resume his studies.¹⁹⁴

* * * * *

These cases' uniform result – summary judgment for the school – did not vary. However, the nature of the claimed disability in these cases varied greatly from physical to emotional to mental. Further, some dismissals occurred at the end of the first year and others in the third year, when the students presumably had made major investments, financial and otherwise, in preparing for a career as an attorney.

Several patterns and areas of guidance for law schools are apparent from this group of cases. First, in a number of the cases (*Anderson, Allison, Marlon, and McGregor*), the students had a long record of academic struggles in law school, and several students (*Anderson, Marlon, and McGregor*) had been given second

187. No. 88 CIV 3184 (CSH), 1988 WL 80236 (S.D.N.Y. July, 27 1988).

188. *Id.*

189. *Id.* at *3.

190. *Id.* at *4.

191. *Id.* at *5. The court said that this decision was based on the possibility of irreparable harm, rather than a showing of likely success on the merits. *Id.*

192. *Id.* at *8 n.4 (“Faculty academic evaluations of this nature are entitled to considerable deference from the courts.”).

193. *Id.* The court distinguished one other dismissed student's situation, and as to two other more similar cases in which the students were readmitted noted:

[T]he Law School's policies reserve to the Academic Status Committee the right to consider each student on an individual basis. In the case of the two students in question, they had demonstrated higher levels of academic performance than had Aloia. The Law School says, in substance, that those performances furnished sufficient evidence of potential to retain the students in question.

Id.

194. Physician statements supplied to the school indicated “this condition is treatable and has an excellent prognosis for full functioning,” and it is “imperative that Richard remain in Law School so as to facilitate” his treatment by medication, were found by the court to “stop well short of expressing an opinion that treatment has succeeded to the point where the individual is able to ‘meet all of a program's requirements in spite of his handicap.’” *Id.* at *9 n.5.

chances to succeed before the final dismissal. These long term academic struggles and prior second chances may have been considered by the courts as evidence of the absence of any hostility toward students with disabilities, as the *Anderson* court appeared to do. On the other hand, *McGregor* hints that perhaps the law school had done the student a disservice by waiving so many standards and rules.

Second, in two cases, *Anderson* and *Aloia*, the students attempted to create an inference of discrimination from pattern evidence. In both of these cases, the courts rejected an inference of bad faith from the student's proffered evidence that other dismissed students had been treated differently. Third, in *Marlon*, the only case decided after *Toyota*, the school successfully convinced the court that the student's impairments did not amount to a statutory disability, despite the opinion of the student's evaluator; in another, *Allison*, the court questioned the student's status as a person with a disability. Fourth, in several cases, for example *Anderson* and *Allison*, the court announced it owed deference to the school's decision not to readmit; in *MacGregor* this deference was extended to the school's decision as to whether providing requested accommodations would alter the school's academic standards. Fifth, in several cases (*Anderson*, *Gill*, *Scott*, *Marlon*, and *Aloia*), the student claimed a disability for the first time after the dismissal. *Aloia* suggests that, in this event, the school can request documentation beyond that supplied by the student and can condition readmission upon additional information. Finally, *Gill* indicates that the school should attempt to make a prediction about the student's ability to succeed with reasonable accommodations.

C. Court Cases Addressing Disability Discrimination Claims By Other Academically Dismissed Higher Education Students

Disability discrimination cases brought by academically dismissed students against non-law school higher education programs¹⁹⁵ show a similar pattern to those brought against law schools. In most such non-law school cases, summary judgment or dismissal was granted to the school.¹⁹⁶ Frequently, the courts in these

195. In a very early Section 504 case in which the court engaged in extensive analysis to determine such now obvious issues as whether there is a private right of action and whether administrative exhaustion is required prior to filing suit, a court addressed a disability discrimination claim by a doctor with multiple sclerosis who was rejected by a psychiatric residency program at a teaching hospital. *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1377-82 (10th Cir. 1981). While the case involves admission to a residency program rather than academic dismissal, *Pushkin* is worth noting as the court in that case determined that the doctor was rejected on the basis of stereotyped information about his disability, and in spite of a letter from the doctor's supervisor in his prior residency commenting that the doctor performed well and his condition did not impair his performance. *Id.* at 1387-88 (noting also that interview ratings by a four-person committee were the articulated basis for the denial only for that applicant, and describing stereotyped comments by committee members and assumptions by them about the effects of the doctor's condition). One commentator suggests that the court in this case performed an analysis like that of intermediate scrutiny under the Equal Protection Clause. Dupre, *supra* note 107, at 412.

196. See *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1067 (9th Cir. 2005) [hereinafter *Wong II*] (stating that a dismissed medical student with learning disability who performed well academically throughout college and two years of medical school does not have a "substantially

limiting” statutory disability); *Betts v. Rector and Visitors of the Univ. of Va.*, 30 NDLR 241 (4th Cir. 2005) (involving a premedical student with a learning disability—found in an earlier decision not to amount to a statutory disability—whose grades improved after accommodations but who did not achieve the required cumulative GPA in a special program for guaranteed entry into the medical school, and whose acceptance was rescinded because of grades); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (upholding the dismissal of a medical student); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (involving a student with ADD who failed out even after being readmitted and receiving accommodations); *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993) (holding that the disability claims of a medical student with panic disorder are time-barred); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234 (D. Mass. 1999) (ruling that a dismissed dental student with a vision problem did not have a statutorily protected disability where the impairment was largely mitigated with corrective lenses; no discrimination involved in his dismissal); *Ferrell v. Howard Univ.*, 17 NDLR 194 (D.D.C. 1999) (medical student with ADD who failed Boards Step 1 three times; finding no discrimination where school was unaware of the disability which was not yet diagnosed at the time readmission was refused; also noting split of authority on whether ADD was an ADA disability); *Leacock v. Temple Univ. Sch. of Med.*, 14 NDLR 30 (E.D. Pa. 1998) (deciding that there is no discrimination where a medical student merely mentioned to the school after she was dismissed that she might have a learning disability and the school was unaware of a diagnosed disability at the time readmission was refused and the school employed fair procedures to allow dismissed students to appeal their dismissal; the school is not required to reconsider its decision after a disability is documented; claims are also time-barred); *Lewin v. Med. Coll. of Hampton Roads*, 910 F. Supp. 1161 (E.D. Va. 1996) (dismissed medical student); *Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529 (N.D. Ga. 1996) (upholding dismissal of fourth year medical student with dyslexia); *Goodwin v. Keuka Coll.*, 929 F. Supp. 90, 94 (W.D.N.Y. 1995) (occupational therapy student who was dismissed under a rule requiring automatic dismissal upon failing two field placements was later diagnosed with mental illness; finding that a “student may not challenge a particular grade or other academic matter absent demonstrated bad faith, arbitrariness, capriciousness, irrationality, or a constitutional or a statutory violation”); *Id.* (stating also that “a student who is automatically terminated from a program who brings subsequent evidence of an alleged learning disability . . . [is not] entitled under federal law to reconsideration of that decision based on new evidence”); *Riedel v. Bd. of Regents of State of Kan.*, 4 NDLR 276 (D. Kan. 1993) (ruling that a student lacked standing since he was neither enrolled nor an applicant where the medical student alleging learning disability was diagnosed two years after dismissal for failing Boards Step 1 four times); *Hanlon v. Bd. of Regents of the Univ. of Wis. Sys.*, 27 NDLR 274 (Wis. Ct. App. 2004) (asthmatic student dismissed from physician assistant training program; finding no discrimination where the school was unaware of the disability at the time of dismissal; finding no discrimination where the student merely mentioned to the school after she was dismissed that she had asthma and the school was unaware of a diagnosed disability at the time readmission was refused); *cf. Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (dismissed medical student who did not earn required grades even after retaking the first year, subsequently diagnosed with attention deficit disorder and learning disability; granting summary judgment on claim seeking only damages and not injunctive relief because of limitations on the circumstances under which damages are available under Title II of the ADA and Section 504); *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (medical student with obsessive compulsive disorder who failed his clinical work; affirming summary judgment for the school where no evidence indicated dismissal was based on discrimination rather than failing grades, but reversing summary judgment for the school on retaliation claim where dismissal and other adverse actions followed the student’s filing of a grievance); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (medical student with test anxiety and unsatisfactory grades who refused opportunity to repeat coursework); *Tips v. Regents of Tex. Tech Univ.*, 921 F. Supp. 1515 (N.D. Tex. 1996) (entering judgment for the school following a bench trial on a disability claim by a dismissed student in a graduate psychology program who failed her written qualifying exams).

cases deferred to the school's academic judgments surrounding the readmission.¹⁹⁷

Only one non-law school case resulted in a judgment for the student. The few non-law school cases in which the dismissed student's claim survived summary judgment offer guidance with regard to what will cause a court not to defer to a school's educational judgment not to readmit a dismissed student: primarily, affirmative evidence of discriminatory intent or bad faith.

1. Evidence of discriminatory (bad faith, stereotypical, and/or retaliatory) thinking

When a school has considered a student to be performing well until she takes a leave of absence for a disability, and only then begins to express concern about her performance, it suggests the performance concerns are a pretext for disability discrimination and will preclude judicial deference and, correspondingly, summary

197. See, e.g., *McGuinness*, 170 F.3d at 979 (according "deference with regard to the level of competency needed for an academic degree"); *Betts*, 30 NDLR 241, at 1089 (noting that the school had:

two choices: ignore years of objective evidence, . . . and allow *Betts* to matriculate based solely on good grades on five tests taken (with double time) over 18 days; or rely on *Betts*' entire academic record . . . and render its academic judgment. . . . We decline to limit the faculty's academic judgment in this fashion. 'Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement.'

(quoting *Kaltenberger*, 162 F.3d at 436)); *Zukle*, 166 F.3d at 1047–48 (noting:

[W]e must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a 'real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.' Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions.

(citing *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25–26 (1st Cir. 1991)); *Kaltenberger*, 162 F.3d at 436–37 (relying on *Horowitz* and *Ewing* to hold that the school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession'" (quoting *Doherty v. S. Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988)); *Ferrell*, 17 NDLR at 839 (citation omitted) ("[A] judgment by a school official that a student has not performed adequately to meet the school's academic standards is a determination that usually calls for judicial deference."); *Leacock*, 14 NDLR at 131 (citation omitted) ("Where there is an academic dismissal, . . . 'courts are ill-equipped to review the largely subjective academic appraisals of the faculty[;]'" also citing *Horowitz* and *Ewing* as mandating deference); *Ellis*, 925 F. Supp. at 1539, 1541–42 (deferring even though the dismissed fourth year medical student enrolled in another medical school and was apparently successful there); cf. *Diaz v. Lehman Coll., City Univ. of N.Y.*, 11 NDLR 321 (S.D.N.Y. 1998) (college student with depression who ceased attending class and left the college with a 1.108 GPA; finding that college's minimum 2.0 GPA requirement is a reasonable decision entitled to deference); *White v. Univ. of S.C.-Columbia*, No. 3:93-1293-23, 1996 WL 276540, at *3 (D.S.C. Mar. 28, 1996) (nursing student with learning disability who was not earning required grades, who was provided with some accommodations and withdrew; deciding that absent evidence of discrimination, deference is owed to a school's determination regarding which accommodations of those recommended by an evaluator are reasonable).

judgment for the school.¹⁹⁸ A court facing this situation concluded that the school “has absolute authority to render an academic judgment, but that decision must be a genuine one.”¹⁹⁹

Similarly, evidence of retaliation against a dismissed student with a disability will likely cause a disability claim to survive summary judgment.²⁰⁰ For example, one school implemented a new clinical rotation grading policy that gave the clinic supervisor increased discretion.²⁰¹ The policy was implemented while the student was hospitalized for mental illness and after he filed a grievance that angered his clinic supervisor.²⁰² That the student was the only one to fail under the new grading policy,²⁰³ but would have passed under the old policy, may raise an

198. *Carlin v. Trs. of Boston Univ.*, 907 F. Supp. 509 (D. Mass. 1995) (deciding that normal deference to a school’s judgment would not be extended; there was sufficient evidence of pretext to deny the school’s motion for summary judgment). *Carlin* involved a student with depression in a doctoral pastoral psychology program who successfully completed three years of classroom instruction and clinical training. *Id.* at 509. She then sought a leave of absence as her depression worsened and she was ultimately hospitalized, then denied readmission to the program. *Id.* at 510.

As to deference, the court held that it would “defer[] to the institution’s decision if there is evidence that the University made a ‘professional, academic judgment that [a] reasonable accommodation [was] simply not available.’” *Id.* at 510 (citing *Wynne*, 932 F.2d at 27–28). In this event, the court noted that the burden would shift to the plaintiff to show “that ‘facts were genuinely disputed or [that] there [is] significantly probative evidence of bad faith or pretext.’” *Id.* (citing *Wynne*, 932 F.2d at 26). Applying this standard, the court found that the school had offered evidence that it had terminated the student because, based on feedback from several faculty and supervisors, she “lacked the capacity” for “psychodynamically oriented pastoral psychology,” and had offered to allow her to transfer to a different program. *Id.* at 511. The court also found that the student had offered evidence of pretext, including that no “lack of capacity” was mentioned until her leave of absence and hospitalization, that her third year clinical experience was successful according to her supervisor, and perhaps most notably, a statement by her advisor that the student was dismissed because “her history of ‘serious mental health problems’ . . . did not provide ‘the kind of environment that is conducive to a return.’” *Id.* (citation omitted).

199. *Carlin*, 907 F. Supp. at 511.

200. *Amir*, 184 F.3d 1017. *Amir* involved a medical student who had some difficulty, both academic and behavioral, in his first two years of classroom-based instruction, but was not at risk of dismissal. *Id.* at 1022. After the student entered his third year, which involved clinical rotations, his mental health difficulties escalated to the point where he was hospitalized. *Id.* at 1023 (the student believed he was being poisoned by his food, drink and medicine, and tried to purge the “poison” with forced vomiting and laxatives). During his psychiatry rotation, the student was diagnosed with obsessive-compulsive disorder and his supervisor, the chairperson of the school’s psychiatry department, convinced him to hospitalize himself. *Id.* He was then denied readmission to the rotation and filed a grievance. *Id.*

201. *Amir*, 184 F.3d at 1023–24.

202. The student’s grievance had made the supervisor admittedly angry, and soon thereafter the department that she chaired changed a grading policy that expanded discretion, and which she used to fail the plaintiff student and no others. *Id.* at 1026 & n.3. After the initial lawsuit was filed, the medical school then dismissed the student without a chance to redo the rotation, as it had allowed him and other students to do in the past. *Id.* at 1027. For a case granting summary judgment on a dismissed student’s First Amendment retaliation claim, see *Garcia*, 280 F.3d 98.

203. *Id.* at 1026 n.3. He was denied the opportunity to redo the rotation or to do it at another location or with another supervisor and was placed on leave while his possible dismissal was investigated, at which point he filed a lawsuit. *Id.* at 1023–24. Several months later, the school

inference of retaliation,²⁰⁴ particularly where the student then enrolled in and successfully completes medical school elsewhere.²⁰⁵

On the other hand, the court saw insufficient evidence, either as to the refusal to provide the requested accommodation or as to the dismissal, for the discrimination claim to survive summary judgment.²⁰⁶ The court found no evidence that the student's disability motivated his dismissal; it found that either his academic performance or retaliation against him for his grievance and lawsuit were the motives supported by some evidence.²⁰⁷ As to the refusal to grant the requested accommodations, the court cited *Ewing* and announced a policy of deference to reasonable academic judgments.²⁰⁸

2. Refusal to consider disability information

Two academically dismissed medical students' claims survived summary judgment when their school's dean, who made the readmissions decisions, announced a complete refusal to consider their disability information, which is another form of discrimination. In *Steere v. George Washington University*,²⁰⁹ a medical school committee recommended to the dean that a student with poor grades be dismissed.²¹⁰ The dean "gave no weight to plaintiff's disability report [which had not been available to the committee], stating that his decision was based on plaintiff's poor academic performance and that he was adopting the [committee] recommendation."²¹¹ The student then enrolled in medical school elsewhere, received accommodations (extended time on exams) and earned passing

dismissed the student "based on a history of poor academic performance and a long-standing history of inappropriate behavior, misrepresentations, and difficulties dealing with staff and faculty" and "failing grades in [two clinical rotations] and [being] ranked near the bottom of his class in overall performance in [another rotation]." *Id.* at 1024 (citations omitted).

204. The trial court had granted summary judgment to the school on both claims, *id.*, but the Eighth Circuit saw the retaliation and discrimination claims quite differently. The appeals court found enough evidence of possible retaliation against the student for filing the grievance and the lawsuit to reverse summary judgment for the school on the retaliation claim. *Id.* at 1026–27.

205. *Id.* at 1024. He amended his lawsuit to claim that his dismissal and refusal to implement his requests as reasonable accommodations amounted to illegal disability discrimination in violation of Title III of the ADA. *Id.*

206. *Id.* at 1028–29.

207. *Id.* at 1028.

208. *Id.* at 1029 (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)) ("We will not invade a university's province concerning academic matters in the absence of compelling evidence that the academic policy is a pretext for discrimination. No such inference can be drawn in the present case." The court also noted that the school policy precluded students with academic difficulty from doing coursework elsewhere, and a request for a different supervisor was not disability-related).

209. 368 F. Supp. 2d 52 (D.D.C. 2005).

210. *Id.* at 54. The student had not identified himself as having a disability either while enrolled or to the committee, but submitted documentation of attention deficit disorder and a learning disability to the dean and requested accommodations. *Id.* at 54–55.

211. *Id.* at 55.

grades.²¹² The court found that the student may have been entitled to a “second chance,” not of readmission itself, but of reconsidering his request for readmission in light of the new impairment information, since the student was not at fault in not identifying himself as having a disability earlier, and denied the school’s motion for summary judgment.²¹³ More recently, and in essentially a rerun of *Steere* (a dismissed student at the same medical school submitted documentation of a learning disability to the dean after the committee recommended dismissal, and the dean refused to consider the new disability information), the same court again denied summary judgment to the school in *Singh v. George Washington University*.²¹⁴

3. Limited deference in the First and Ninth Circuits

As a condition of deference to the readmission decision when a disability is involved, two federal appeals courts require schools to create a factual record of their deliberations. These courts reason that this affords both deference to the school’s academic judgment and meaningful protection of the student’s rights under disability discrimination laws.

In *Wynne v. Tufts University School of Medicine*,²¹⁵ an academically dismissed student diagnosed with dyslexia requested an alternative format to multiple choice tests as an accommodation for his disability.²¹⁶ While ultimately granting summary judgment to the school,²¹⁷ the First Circuit, citing *Ewing*, announced a policy of deference to the school’s academic judgment in the context of statutory discrimination claims, with limits.²¹⁸ Specifically, the court required a “factual record” from the school demonstrating that the school had considered alternative ways for the student to meet its academic standards with reasonable accommodations.²¹⁹ The court found a “conclusory affidavit” from the medical

212. *Id.*

213. *Id.* at 56–57. The court contrasted this case, where the student provided documentation of an impairment before the decision to dismiss, with others where the student either did not mention a disability or only self-reported as possibly having a disability without submitting an actual diagnosis. *Id.* at 56.

214. *Singh v. George Wash. Univ.*, 368 F. Supp. 2d 58 (D.D.C. 2005) (stating that deference is not appropriate where the disability information has not been considered; finding also an issue of fact as to whether the dismissed medical student was a person with a disability under federal statute), *reconsideration denied*, 383 F. Supp. 2d 99 (D.D.C. 2005).

215. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991), *on appeal from remand*, 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993).

216. *Id.* at 21–22.

217. *Wynne*, 976 F.2d at 796.

218. The court contrasted *Ewing*, in which there was no statute that limited the school’s freedom to use its academic judgment. *Wynne*, 932 F.2d at 25. The *Wynne* deference standard has been criticized as too limited. See Claire E. McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 634 (1995) (calling *Wynne* “an inroad into the halls of academe by calling upon professional educators to present evidence regarding the steps they have taken to verify the reasonableness of their determination”).

219. According to the court:

school's dean insufficient as it did not consider alternatives and it was not specifically clear that this was the medical school faculty's judgment.²²⁰ On remand, the court found the factual record submitted by the school, which detailed the faculty's thought process as to why a different testing format would alter its academic standards, to be sufficient as a matter of law, even as against the student's affidavits indicating that one other medical school and a national testing service offered oral versions of multiple-choice tests; the court deferred to and affirmed a summary judgment for the school.²²¹

This limited deference approach to both whether requested accommodations are reasonable and whether, with accommodation, dismissed students are "qualified" to continue their studies was adopted by the Ninth Circuit in *Wong v. Regents of University of California* ("Wong I");²²²

[D]eference is not absolute . . . : courts still hold the final responsibility for enforcing the Acts We must ensure that educational institutions are not "disguis[ing] truly discriminatory requirements" as academic decisions; to this end, "[t]he educational institution has a 'real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.'" Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Wynne, 932 F.2d at 26. The court indicated that the sufficiency of this factual record would normally be a legal question, and thus presumably resolvable by summary judgment. *Id.*

220. *Id.* at 27–28. In a dissent authored by then-Judge Breyer, three judges agreed with the limited deference standard announced by the majority, but found that the dean's affidavit met this standard. *Id.* at 29–31 (Breyer, J., dissenting).

221. *Wynne*, 976 F.2d at 794–95. The court noted:

[T]he point is not whether a medical school is 'right' or 'wrong' in making program-related decisions. Such absolutes rarely apply in the context of subjective decision-making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make 'a professional, academic judgment that [a] reasonable accommodation [was] simply not available.'

Id. at 795 (citing *Wynne*, 932 F.2d at 27–28).

222. 192 F.3d 807 (9th Cir. 1999). As discussed earlier, the court later granted the school's motion for summary judgment on a different basis; namely, that the student did not have a statutorily protected disability, as his impairment was not substantially limiting in light of his history of academic success, without accommodations. *See supra* notes 38–43 and accompanying text.

or substantially modifying the school's standards.²²³

Applying this standard, the Ninth Circuit reversed the summary judgment granted by the trial court to the school on the reasonableness of the decision not to offer the requested accommodation of an eight week reading period prior to each clinical rotation.²²⁴ The decision to refuse this accommodation was made by the medical school dean without consideration of disability information or consultation with the student.²²⁵ Its initially articulated basis for refusing the reading period was not academic, but rather the student's reported desire to graduate in the normal time and the dean's belief that the student did not need the reading period.²²⁶ The dean had told the student not to mention the requested accommodation to the school's readmission committee.²²⁷

The court concluded:

The deference to which academic institutions are entitled when it comes to the ADA is a double-edged sword. It allows them a significant amount of leeway in making decisions about their curricular requirements and their ability to structure their programs to accommodate disabled students. On the other hand, it places on an institution the weighty responsibility of carefully considering each disabled student's particular limitations and analyzing whether and how it might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards or otherwise unduly burdening the institution We will not sanction an academic institution's decision to refuse to accommodate a disabled student and subsequent dismissal of that student when the record contains facts from which a reasonable jury could conclude that the school made those decisions for arbitrary

223. *Id.* at 817–18 (emphasis in original) (quoting *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999) (quoting *Wynne*, 932 F.2d at 25–26)). See *Wynne*, 932 F.2d at 26 (explaining that institution needs to submit “*undisputed facts*” showing that “relevant officials” “considered alternative means, their feasibility, [and] cost and effect on the academic program”) (emphasis added); *id.* at 28 (refusing to defer when and institution presented no evidence regarding “who took part in the decision” and finding “simple conclusory averment” of head of institution insufficient to support deferential standard of review). “We defer to the institution's academic decisions only after we determine that the school ‘has fulfilled this obligation.’” *Wong I*, 192 F.3d at 818 (citing *Zukle*, 166 F.3d at 1048).

224. *Wong I*, 192 F.3d at 818–19.

225. *Id.* at 819.

226. *Id.*

227. *Id.* at 819–20. The Ninth Circuit found an issue of fact as to whether this was a reasonable accommodation for several additional reasons: the Section 504 regulations specifically include extending the time to complete degree requirements as an example of a reasonable accommodation, the school had provided pre-clinical rotation reading periods in the past for Wong and other students, Wong had been successful with a reading period, and the reading period was being recommended by a member of the medical school faculty who was the school's Coordinator of Student Learning Disability Resource Teams. *Id.* On these facts the court found that a jury could find this faculty member to be an expert on whether the reading periods would be a reasonable accommodation. *Id.* at 820.

reasons unrelated to its academic standards.²²⁸

4. Judgment on the merits for a student

A final case, *Dearmont v. Texas A & M University*,²²⁹ actually resulted in a dismissed graduate student receiving a judgment, which included reinstatement, money damages, and attorney's fees after apparent harassment by the faculty in his department.²³⁰ After a student in a small agricultural economics doctoral program twice failed his qualifying exams, he was diagnosed with a learning disability and provided an accommodation of double time on his exams.²³¹ His department then modified the content, format and grading of the exams, which caused the student to earn an even lower score than he had previously, and gave him a "surprise oral exam" and dismissed him.²³² When the department was ordered to give him the exams in their original version,²³³ the department then changed the GPA requirements for serving as a research assistant.²³⁴ The student did not meet the new requirement and was replaced.²³⁵ Without the income for this position, the student apparently was not financially able to continue his studies.²³⁶

The court's opinion offers helpful guidance for schools on what *not* to do when dealing with an academically dismissed student with a disability:

By the time Dearmont [was diagnosed] . . . , the faculty had formed an opinion from the effects of his disability that Dearmont was a marginal student at best, and they refused to make a reasonable accommodation to his handicap. When required by outside pressure, they went through the motions of accommodation, while stepping up the pressure directly and indirectly. The actual accommodations were more than offset by the concomitant harassment.

. . . .

[Section 504] does not require institutions to engage in the expensive, empty gesture of educating people who cannot function productively in the community. It does, however, prevent this kind of casual rejection of someone who is capable and qualified because of ungenerous perceptions of the effects of a non-disabling handicap.

A vast amount of the process of higher education must be subjective. The necessity of subjectiveness does not require society to abandon the students to the mere will of the professors, the experts. If any

228. *Id.* at 826.

229. 2 NDLR 10 (S.D. Tex. 1991).

230. *Id.* at 35.

231. *Id.* at 31–32.

232. *Id.* at 32.

233. The student had appealed his dismissal to the school's graduate council, which ordered reexamination under the original content, format, and grading procedures. *Id.* at 33.

234. *Id.*

235. *Id.* at 32–33.

236. *Id.* at 33.

governmental program [ought] to be able to articulate the reason of its procedures, graduate education should. Governmental professors, with their own careers, policies, and favorites, are no less prone to abuse of the authority the community has conferred on them than the officer on the beat. . . .

. . . .

Despite making exceptions for other students who had a problem passing the qualifying examination, the faculty decided that Dearmont's performance made him unqualified. To support their decision to replace Dearmont with a more promising candidate, Dearmont's faculty advisors threw him a surprise defense of his research plan. Assuming his performance at the inquisition was deficient, it was a wholly contrived requirement. The development of Dearmont's research had never been discussed with him in any deliberate session with any of the faculty advisors before the bushwhacking.

The actions of the defendants show a rejection of Dearmont based on his handicap, followed by a series of transparent gimmicks to cloak the decision with additional evidence.²³⁷

* * * * *

The non-law school cases, most of which involve medical school or other health care professional training programs, also show a pronounced pattern of success for the school, and perhaps even more consistently announce deference to the school's decision than do the law school cases. The seven cases in which the school did not completely prevail (*Carlin*, *Steere*, *Singh*, and *Amir*, in which the school was denied summary judgment; *Wong I* and *Wynne*, in which the school lost its initial motion for summary judgment but then prevailed on a subsequent summary judgment motion; and *Dearmont*, in which a judgment was actually ordered in favor of a dismissed student against a school) show clear patterns that provide helpful guidance for schools. First, in a number of the cases the dismissal/readmission decision was made by a single person (a dean in *Singh*, *Steere*, *Wong I*) or a small and presumably close department (*Carlin*, with apparent significant influence on the decision by a single faculty member who was the student's adviser, and *Dearmont*). In such cases, the danger of a decision tainted by discriminatory intent, or at least a disputed issue of fact on intent, is likely heightened. Second, in several cases (*Singh*, *Steere*, and *Wong I*), the decision-making dean refused to consider the student's disability information. In these cases, while there was a committee that made a recommendation to the dean, it apparently had no pre-announced standards to apply to make that recommendation.

Third, in several cases, there was evidence that the decision-maker(s) engaged in discriminatory (bad faith, stereotypical, and/or retaliatory) thinking. In *Carlin*, a previously successful student was found to have a "lack of capacity" and terminated after she was hospitalized for depression.²³⁸ In *Amir*, grading and other

237. *Id.* at 33–34.

238. *Carlin v. Trs. of Boston Univ.*, 907 F. Supp. 509 (D. Mass. 1995).

policies and practices were changed and applied to the student's detriment by a small department chaired by a person who was admittedly angry that the student had filed a disability discrimination complaint.²³⁹ In *Wong I*, the dean instructed the student not to mention the disability to a committee and did not initially articulate academic reasons for his denial of requested accommodations.²⁴⁰ Additionally, in *Dearmont* the court found that the small department engaged in harassment after the student documented a disability.²⁴¹ Fourth, in two cases (*Steere* and *Amir*), there was unusually strong conflicting evidence that the student could succeed: the dismissed student enrolled at another school, received the requested accommodations, and was academically successful.²⁴²

Finally, in some cases, the denial of readmission was contrary to the recommendation of an internal school expert. In *Wong*, for example, the decision was contrary to a recommendation by an internal faculty expert.²⁴³ Similarly, in *Carlin*, the school expert's assessment of the student's ability conflicted with the clinical supervisor's favorable assessment of the student's performance.²⁴⁴ Furthermore, in an OCR opinion discussed below,²⁴⁵ DePaul University's internal expert evaluation that a student's dyslexia impairment was significant conflicted with its law school's assessment based on the previously supplied report of an eye doctor that the dyslexia was not significant. These cases do not evidence a pattern of greater deference to schools when the disability is mental as opposed to physical, despite the contrary suggestion of one commentator.²⁴⁶

When the law school and non-law school cases are combined, a variety of patterns emerge. Most striking is the pattern of results: schools win, and do so convincingly, normally at the as-a-matter-of-law level at the summary judgment or dismissal stage, rather than going to trial. This is so in large part because courts hearing these disability discrimination claims routinely announce a pattern of deference to the school's academic judgments. Deference is specifically extended to the decisions as to, 1) whether the dismissed student meets the school's readmission standards, and 2) whether academic accommodations requested by the dismissed student are reasonable on the one hand, or would alter the school's

239. *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999).

240. *Wong I*, 192 F.3d at 823.

241. *Dearmont*, 2 NDLR at 10.

242. Such conflicting evidence is less likely to be available to law students, since law school accreditation requirements require dismissed students to sit out two years before applying to other law schools. See AM. BAR ASS'N, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2005-2006, Standard 505, <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>. However, if a law school allows dismissed students to continue in summer courses while their petitions are pending, students' grades in those courses may amount to such evidence.

243. *Wong I*, 192 F.3d 807.

244. *Carlin*, 907 F. Supp. 509.

245. See *infra* notes 285-300 and accompanying text.

246. Tucker, *supra* note 1, at 39 (suggesting that, for academic decisions generally, more deference is given when the student's disability is mental rather than physical).

academic standards on the other.

While the courts' announcement of deference to these decisions is consistent, there is some variety in the articulated reasons for the deference, the conditions that will trigger deferral, and the exact nature of the deferral. One commentator suggests that while "[d]eference determinations under Section 504 and the ADA vary considerably, . . . the general trend . . . seems to be toward some form of rational basis review."²⁴⁷ Another commentator, Professor James Leonard, reviews the cases on disability challenges to academic decisions, including dismissal and readmission, and identifies three approaches to deference in these cases.²⁴⁸ In the first approach, in which Professor Leonard finds only one case, the court simply did not defer and instead allowed the parties to create a battle of experts, with the court ultimately imposing its own judgment.²⁴⁹ Leonard places *McGregor* and *Anderson* in a second group of cases in which, largely for reasons of lack of judicial expertise, and much in the manner of the Court in *Ewing*, courts will "defer to academic authorities whenever they can demonstrate a reasonable [educational] basis for their decisions,"²⁵⁰ and there is no evidence of discriminatory intent.²⁵¹ The third group of cases, into which Leonard places *Wynne*, supplements the reasonable basis standard of the second group of cases by adding a requirement that the school "consider any suggestions for accommodations in good faith and keep reliable records of the decisional process."²⁵²

This pattern of deference to higher education schools' academic judgments in the context of federal statutory disability claims is again in contrast to the approach taken under the IDEA. Although IDEA disputes typically involve a challenge to a school's academic judgment about what is the free appropriate public education for a given student,²⁵³ or where is the least restrictive environment to provide that program,²⁵⁴ courts do not defer to the school's judgment on these issues.²⁵⁵ This

247. Dupre, *supra* note 107, at 419.

248. Leonard, *supra* note 117.

249. *Id.* at 61–62 (citing *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981), which involved a doctor seeking a paid residency and is thus technically an employment case).

250. *Id.* at 63.

251. *Id.* at 63–68.

252. *Id.* at 68–69 (suggesting that this standard is actually the most protective of school autonomy, as whether a school engaged in good faith consideration of accommodations is normally an undisputed factual issue which can be resolved at the summary judgment stage).

253. The first U.S. Supreme Court case interpreting the IDEA involved a dispute over its free appropriate public education provision. *Bd. of Educ. of the Hendrik Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982) (deciding that IDEA's appropriate education requirement requires a program reasonably calculated to confer educational benefit; stating also as to a hearing-impaired student easily earning passing grades with tutoring and a hearing aid, IDEA is satisfied and a full-time sign language interpreter is not required).

254. *See, e.g., Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (stating that the least restrictive environment for student with mental retardation is general education).

255. 20 U.S.C.A. § 1414 (2006); 34 C.F.R. § 300.344 (2005).

lack of judicial deference exists even though the staff at public preK-12 schools, unlike higher education faculty, is formally trained in education, and the team which makes IDEA programming decisions includes at least one internal school expert in special education.²⁵⁶ However, because of the special dispute resolution system Congress established for the IDEA,²⁵⁷ and in marked contrast to the cases where courts examine higher education students' disability discrimination claims, a court reviewing a dispute under the IDEA has the benefit of the expertise not only of school authorities but also of the hearing officer who is trained in special education.²⁵⁸

D. OCR Opinions Addressing Disability Discrimination Claims By Academically Dismissed Law Students

While not binding precedent, OCR has issued numerous opinions concerning disability discrimination complaints by academically dismissed law and other higher education students. Just as with the courts, academically dismissed students have had very little success with OCR. In almost all of the law school cases, OCR has found for the school.²⁵⁹ A review of these opinions, however, indicates OCR takes a somewhat different approach than the courts.

The OCR opinions concerning academically dismissed law students do not discuss deference specifically; however, in other cases OCR has announced a policy of deference.²⁶⁰ OCR does make clear in the dismissed law student opinions that meeting the school's minimum academic standards is an essential academic requirement, and a legitimate nondiscriminatory reason for dismissing/refusing to readmit a student. As to those standards, OCR has suggested that a variety of readmissions standards are nondiscriminatory: not making a readmissions process available at all,²⁶¹ rules which limit the opportunity

256. For a comparison of the lack of deference under the IDEA with the deference accorded colleges and universities, and an argument that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments, see Dupre, *supra* note 107, at 393.

257. See *supra* notes 100–102 and accompanying text.

258. See *id.*

259. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003); Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003); Letter to: Univ. of Chi., 26 NDLR 187 (OCR 2003); Letter to: Villanova Univ., 16 NDLR 170 (OCR 1999); Letter to: Univ. of S.F., 17 NDLR 61 (OCR 1999); Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998); Letter to: Hastings Coll. of Law, 4 NDLR 226 (OCR 1993); Letter to: Cleveland State Univ., 3 NDLR 198 (OCR 1992); Letter to: McGeorge Law Sch., 1 NDLR 337 (OCR 1991); Letter to: Golden Gate Univ., 2 NDLR 253 (OCR 1991); Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990).

260. Letter to: N. Ill. Univ., 7 NDLR 392, at 1359 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction.”); Letter to: Univ. of Tenn. at Martin, 14 NDLR 72, at 268 (OCR 1998) (“[A]bsent evidence of a discriminatory intent, reasonable deference must be accorded to the academic decisions of educational institutions.”); Letter to: Ind. Univ. Nw., 3 NDLR 150, at 620–21 (OCR 1992) (deference to “collective wisdom of the faculty”).

261. Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003) (stating that if a process is established, it must be available on an equal basis to students with disabilities). Note that if a readmissions process is not available, dismissed students with disabilities could still use the

to petition for readmission to students in a certain GPA range, not providing a petition opportunity to students with GPAs below this range,²⁶² and requiring dismissed students to sit out a year before reenrolling.²⁶³ In applying the school's readmission standard, OCR has suggested that schools may consider a variety of information, including accreditation standards concerning admission,²⁶⁴ whether the petition is honest and truthful²⁶⁵ or is of good quality,²⁶⁶ and whether the student is effective in any presentation to—and meeting with—the committee.²⁶⁷

All of these standards and information must be applied to and considered for all students, with or without disabilities. To determine whether the decision was tainted by improper discrimination, OCR often interviews the committee members who made the readmission recommendation/decision, reviews the school's policies and practices with regard to students with disabilities,²⁶⁸ and examines statistics and individual files of other petitioning students, presumably in order to compare application of the readmissions standard and process as between applicants with and without disabilities.

Concerning specific disability information presented by a petitioning student, OCR indicates that law schools may require dismissed students to provide documentation of disability or other circumstances,²⁶⁹ and law schools must give any such submitted documentation "reasoned and informed consideration."²⁷⁰ Moreover, law schools may require expert evaluations to be submitted in writing and need not agree to have the expert appear in person to discuss the evaluation with the committee (presumably to the extent it does not allow petitioning students to present witnesses generally).²⁷¹

After duly considering disability information supplied by a petitioning student,

Section 504 grievance procedure, as well as OCR complaints and litigation, to challenge their dismissal. See *supra* notes 69–71 and accompanying text for a discussion of Section 504 internal grievances and OCR complaints. The grievance procedures under Title VI of the Civil Rights Act can be found at 34 C.F.R. §§100–101 (2006). 34 C.F.R. § 104.62 makes the Civil Rights Act procedures applicable to Section 504 cases.

262. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (2.0 minimum GPA; students below 1.8 have no opportunity to petition for readmission).

263. Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998).

264. Letter to: Villanova Univ., 16 NDLR 170, at 776 (OCR 1999). The court referred to the former ABA requirement 304 that "[a] law school shall not, either by initial admission or subsequent retention, enroll or continue a person whose inability to do satisfactory work is sufficiently manifest. . .," currently found at AM. BAR ASS'N, *supra* note 242, at Standards 501 & 505.

265. Letter to: Cleveland State Univ., 3 NDLR 198 (OCR 1992).

266. Letter to: Golden Gate Univ., 2 NDLR 253, at 941 (OCR 1991) (dealing with spelling, grammar, and other mechanical problems as well as less than "compelling . . . reasoning and arguments").

267. Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990) (concerning a student who rambled and did not answer committee's questions).

268. See Tucker, *supra* note 1, at n.22 and accompanying text, for a collection of OCR opinions on the issue of the existence and adequacy of such policies.

269. Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003).

270. *Id.* at 934.

271. Letter to: Villanova Univ., 16 NDLR 170, at 776–77 (OCR 1999).

OCR has suggested that law schools may find that the non-disability reasons contained in a student's readmission petition caused her failure, rather than a disability not disclosed in the petition.²⁷² A law school may conclude that academic failure was caused by circumstances unrelated to any disability. For example, a law school may deny admission to a student with a disability because of a "very low LSAT score" and simply "[not understanding] the basic concepts of the subject matter."²⁷³ Similarly, a law school may conclude that a student's learning disability did not cause his academic failure.²⁷⁴ A law school may conclude that the student's failure was caused by lack of understanding of the material, lack of preparedness for class, lack of organization, and tardiness for an exam, rather than a disability.²⁷⁵

When a law school's readmission standard requires extraordinary circumstances, a law school need not find a dismissed student's disability to be an extraordinary or compelling circumstance,²⁷⁶ but law schools must consider dismissed students' disabilities which were "previously undisclosed or unidentifiable," to the extent the school considers other unknown or undisclosed non-disability circumstances.²⁷⁷

When considering a dismissed disabled student's potential to succeed if readmitted, a law school should evaluate "how the student's disability affected his or her performance, and whether the student has been provided with necessary [accommodations]."²⁷⁸ When petitioning students assert that they can succeed with accommodations, law schools must take failure to receive accommodations into account when making readmissions decisions if there has been reasonable documentation of a disability and a proper request for accommodations, however the "significance of the failure to receive [accommodations] would vary with the circumstances of the case."²⁷⁹

A law school may determine that certain requested accommodations are not reasonable. For example, while whether an accommodation is reasonable must always be determined on an individualized basis, OCR has found certain requests in specific cases to be beyond those which are required reasonable accommodations. Normally, for example, minimum GPA requirements are essential academic standards and waiver of them is not a reasonable accommodation.²⁸⁰ Along the same lines, a law school need not agree to a

272. *Sw. Univ. Sch. of Law*, 26 NDLR 211 (OCR 2003).

273. Letter to: Hastings Coll. of Law, 4 NDLR 226 (OCR 1993).

274. Letter to: McGeorge Law Sch., 1 NDLR 337 (OCR 1991) (concerning a student with a learning disability who succeeded on some timed exams and whose reading speed was in the normal range); Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990) (dealing with a legally blind student with a cumulative GPA of 0.533).

275. Letter to: Whittier Coll. Sch. of Law, 4 NDLR 183 (OCR 1993).

276. Letter to: Univ. of S.F., 17 NDLR 61 (OCR 1999).

277. *Sw. Univ. Sch. of Law*, 26 NDLR at 934 (OCR 2003).

278. *Hastings Coll. of Law*, 4 NDLR 226 (OCR 1993).

279. *Sw. Univ. Sch. of Law*, 26 NDLR at 934 (OCR 2003).

280. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (noting also that school's judgments and resulting rules, concerning minimum GPAs and opportunities for readmission,

dismissed student's request for accommodations in the form of breaking down complex essay exam questions into parts and allowing outline format for answers, as these adjustments would modify essential elements of the law school program.²⁸¹

In two reported law school cases, each more than ten years old, OCR expressed concern about a law school's handling of a disabled student's readmission petition. In one case, OCR appeared to believe that the law school had steered a student with a potential disability toward an evaluator about whose qualifications OCR had concerns, but made no final determination as to whether the school had engaged in discrimination.²⁸² OCR noted that this evaluator had established a course of "treatment" (OCR's quotation marks) for the student's learning disability.²⁸³ The school agreed to fund "valid diagnostic testing . . . from a qualified professional."²⁸⁴ One might infer from this that OCR thought the learning disability may not have been appropriately diagnosed and could not be "treated" effectively, at least by this evaluator.

In the second case, *DePaul University*,²⁸⁵ the student also had apparently initially gotten some bad expert advice about her impairment from an unqualified "expert" that her dyslexia was quite mild and accommodations were not necessary.²⁸⁶ In her first year of law school, the student struggled and the university's program for diagnosing and evaluating students with learning disabilities²⁸⁷ tested the student and orally requested accommodations for the student, specifically a reduced course load and extra time on exams from the law school.²⁸⁸ The student received some accommodations late in the school year but did not earn the minimum required grades, was academically dismissed, and

were recommended by a faculty committee and adopted by the full faculty and were based on past successes of students with low GPAs, the school's bar pass rate, and a desire to avoid taking tuition from students whose prognosis for academic success, success on the bar exam, and competence in practice was poor).

281. Letter to: Villanova Univ., 16 NDLR 170, at 776 (OCR 1999) (noting also that an expert evaluation which stated the student needed these changes to succeed in law school actually was evidence that she could not be academically successful unless the law school program was fundamentally altered).

282. Letter to: Pepperdine Univ., 7 NDLR 62 (OCR 1995).

283. *Id.* at 201.

284. *Id.*

285. Letter to: DePaul Univ., 4 NDLR 157 (OCR 1993).

286. The student had not been formally diagnosed with, nor received any services for, an impairment prior to law school, and had maintained a B average in college. *Id.* at 604. As a college senior, an ophthalmologist (an M.D. specializing in vision care) informed her that she was dyslexic without doing any testing. *Id.* The student reported she was dyslexic on her application as a means of supporting her assertion that her LSAT score underestimated her ability. *Id.* She attached a letter from the ophthalmologist that noted that "dyslexia is minimal and [she] should not require accommodations." *Id.* at 605.

287. *Id.* at 605-06.

288. *Id.* at 605. The law school asked for written documentation before making a decision; when documentation was provided, which was near the end of the academic year, the law school implemented the bulk of the requested accommodations. *Id.*

petitioned for readmission.²⁸⁹

The school's approach to processing readmissions petitions did not appear to instill confidence in OCR. After two days of meetings to decide thirty-three readmissions petitions in which much information was not available until the members arrived at the meeting, the readmissions committee granted thirteen of the petitions.²⁹⁰ The student's petition was the only one which reported a disability and it was denied.²⁹¹ In fact, the committee could not recall any prior petitions asserting a disability.²⁹² A readmissions form for each student had a space for the committee to write the reasons for its decision, but the form was left blank or only cursorily completed in many cases, including that of the complaining student.²⁹³ No notes of the meeting were available from the law school or individual committee members.²⁹⁴ In the complaining student's case, no committee member could remember who was assigned responsibility for presenting her petition, nor could any committee member specifically recall the reason(s) for denying it, and the partial recollections were somewhat inconsistent.²⁹⁵

OCR closely second-guessed both the committee's reasoning, as much as it could be reconstructed, and its pattern of readmitting a number of students who appeared to be no more qualified than the complaining student.²⁹⁶ For example, the committee readmitted a student who attributed her failure to a personal problem which happened before starting law school but for which she did not receive counseling during her first year of law school, and others who attributed their failures to "difficulties with the academic rigors of law school" and "poor study habits," respectively.²⁹⁷ Moreover, OCR found that some of the committee members' comments to one another, particularly a statement by one member that the impairment was "now just an excuse for her poor grades," demonstrated an improper, stereotyped view of how disability might have an impact on academic performance.²⁹⁸ OCR concluded that the committee had considered the disability information in a stereotyped rather than an informed way.²⁹⁹ Under these circumstances, OCR faulted the committee for not undergoing any training, nor consulting with its own in-house experts at the university program for students

289. *Id.* at 605–06.

290. *Id.* at 606.

291. *Id.* at 607.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* Lapse of time may explain the committee members' lapse of memory. These readmissions decisions took place in the summer of 1988. *Id.* at 606. The OCR decision is dated May 1993, almost five years later. *Id.* at 603. Section 504 regulations provide that OCR complaints must be filed within 180 days of the alleged discrimination, unless OCR finds good cause for a later filing. 34 C.F.R. § 100.7 (2005). The opinion does not address the delay in filing the complaint.

296. *DePaul Univ.*, 4 NDLR at 608–09.

297. *Id.* at 609.

298. *Id.*

299. *Id.*

with learning disabilities.³⁰⁰

E. OCR Opinions Addressing Disability Discrimination Claims By Other Academically Dismissed Higher Education Students

In non-law school academic dismissal readmissions cases, OCR has also consistently found for the school.³⁰¹ In the one non-law school academic dismissal readmissions case in which OCR determined Section 504 had been violated, the school had failed to offer the student timely and reasonable accommodations.³⁰² The school agreed to readmit the student on probationary status and provide appropriate accommodations.³⁰³

VI. JUDICIAL DEFERENCE TO REASONED ACADEMIC READMISSIONS JUDGMENTS INVOLVING STUDENTS WITH DISABILITIES IS APPROPRIATE

Judicial deference to the judgment of a law school or other higher education program's faculty not to readmit an academically dismissed student is the only sound approach.³⁰⁴ The readmissions judgment is not only academic in nature, but

300. The university agreed to settle the complaint in an undisclosed manner. *Id.* In more recent cases, OCR has made it clear that under normal circumstances, schools must consider expert information in a reasoned and informed way, but are not required to seek out nor defer to expert opinions on academic issues. *See, e.g., Sw. Cmty. Coll. Dist.*, 29 NDLR 210 (dealing with a school that provided OCR with detailed record of its decision-making process, in which the school considered a letter of support provided by the university disability support services officer, but denied a readmission petition of an academically dismissed dental hygiene student, did not engage in illegal discrimination).

301. *Sw. Cmty. Coll. Dist.*, 29 NDLR 210 (pertaining to dental hygiene student); Letter to: Lourdes Coll., 29 NDLR 25 (OCR 2004) (dealing with a nursing program); Letter to: Touro Univ., Coll. of Osteopathic Med., 24 NDLR 292 (OCR 2002); Letter to: E. Va. Med. Sch., 2 NDLR 229 (OCR 1991); Letter to: Tex. Chiropractic Coll., 2 NDLR 252 (OCR 1991); Letter to: Univ. of Pa., 28 NDLR 192 (OCR 2003) (dealing with M.S.W. student); *cf.* Letter to: Cal. State Univ., 7 NDLR 96, at 321 (OCR 1995) (addressing a student who was denied readmission to teacher preparation program after withdrawal "by mutual consent" and related to her emotional disability); Letter to: Regent Univ., 27 NDLR 63 (OCR 2003) (deciding that school did not discriminate when it required an M.B.A. student with bipolar disorder, who withdrew from program after erratic and threatening behavior, to undergo a psychiatric evaluation as a consideration of readmission).

302. Letter to: Tuskegee Univ., 1 NDLR 226 (1990) (finding that the university disability office told a student with a learning disability before he enrolled that accommodations would be available; that office's director then retired, and the student was not provided with accommodations for several months until the problem was discovered).

303. *Id.*

304. Other commentators agree. *See Dupre, supra* note 107, at 466–71 (arguing that deference should extend to the academic decisions of elementary, secondary, and higher education academic decisions, with limits such as those announced in *Wynne* which she equates with intermediate scrutiny); Leonard, *supra* note 117, at 88–90 (advocating the *Wynne* limited deference approach); *id.* at 70–74 (reasoning that academic higher education decisions are particularly subjective and far outside the courts' expertise and thus, without deference, would be resolved by a battle of experts in areas in which the experts themselves disagree and in which there are no concrete standards to apply); *id.* at 74–83 (arguing that higher education academic standards and decisions are polycentric in nature, as described by Lon Fuller, *The Forms and*

is subjective, complex, context-dependent, and highly specialized. Apparently in contrast to the approach at some medical schools where a single dean makes the decision,³⁰⁵ readmissions decisions at law schools are normally made by a group of persons (a faculty committee or the entire faculty). In the case of a student claiming a disability, there are built-in statutory incentives to err on the side of the student in close cases,³⁰⁶ thus minimizing the possibility of making the decision inappropriately. In contrast even to another group of deferred-to academic decisions—initial admissions to higher education programs—the decision not to readmit a student who has been academically dismissed is made by a faculty after it has had considerable experience with the student’s academic performance and abilities. Readmission of an academically dismissed student is thus the sort of decision most inimical to the program’s academic freedom and most outside the expertise of the courts.

Deference to these decisions is also particularly appropriate at the level of professional school and similar programs, where virtually all the actual cases occurred, because of the stakes involved in wrongful readmission for the readmitted student, the school, and the public. Whether or not she has a disability, the student who wrongfully is not readmitted at least can try her luck at other schools and perhaps ultimately continue on her planned career path. For example, the many students in the court cases and OCR opinions discussed above, whose impairments are first diagnosed at the time of their dismissal, can develop learning and other coping strategies for their newly-discovered impairments and later apply for admission. In contrast, the student who is wrongfully readmitted (that is, readmitted when she is not academically capable even if reasonable accommodations are provided) is at serious risk of being unable to pass related licensing exams such as bar exams and the medical boards exams, and/or to competently practice her chosen profession. As one court has noted, by readmitting a student, a school conveys its imprimatur that the student will in fact be successful in these ways.³⁰⁷ When a student is wrongfully readmitted, the

Limits of Adjudication, 92 HARV. L. REV. 353, 394 (1978), and involve many interdependent competing interests; they are unsuited for judicial resolution, but are appropriately resolved by managerial direction, such as faculty decision-making; law school standards are school-specific, so what other schools do is not particularly probative evidence); *id.* at 83–84 (discovering how lack of deference would incentivize schools to soften their academic standards to avoid litigation and inappropriately adversarialize the student-faculty relationship); *id.* at 85–86, 88–89 (concluding that unlimited deference may not encourage schools to truly introspect and consider alternatives for students with disabilities, but *Wynne* limited deference standard addresses this concern).

One commentator suggests that the judicial deference to academic decisions generally is appropriate because it “provides for a more efficient distribution of decision-making between the courts and higher education while retaining the ability for courts to intervene in situations where the university officials may act inappropriately.” Stoner & Showalter, *supra* note 107.

305. See *Steere*, 368 F. Supp. 2d 52 (D.D.C. 2005); *Singh*, 368 F. Supp. 2d 58 (D.D.C. 2003).

306. The prospect of costly litigation, as well as the prospect of losing the litigation and becoming responsible for the student’s attorney’s fees under these fee-shifting statutes, provide incentives for schools to err on the side of the student in close cases.

307. *Kaltenberger*, 162 F.3d at 436–37 (citing *Horowitz*, 435 U.S. at 96 n.6, and *Ewing*, 474

school's integrity and reputation are harmed. Most importantly, there is obvious risk to the public if wrongfully readmitted students go on to practice their profession less than competently. In the case of health care professionals, health and safety are directly at risk. In the case of attorneys, the risk is not a physical safety one but rather puts at risk the competent resolution of clients' high stakes legal problems, including, for example, incarceration of criminal defendants and custody of children.

Deference is also consistent with the systems established by Congress for resolution of disability discrimination disputes. While the IDEA establishes a system of impartial hearing officers trained in both special education and law, who have the necessary expertise to closely review a school's judgment,³⁰⁸ no such system is in place for higher education students' disability discrimination claims. Judges hearing IDEA lawsuits receive the administrative record from this hearing, including specific findings of fact and conclusions, and may base their judgment solely on this record, treating the matter in the manner of an administrative appeal.³⁰⁹ In contrast, in higher education, Congress chose not to establish administrative hearings and chose not to involve expert hearing officers;³¹⁰ hence, the judge hearing a higher education disability discrimination case does so without an administrative record or independent expertise.

The different natures of the schools covered by the IDEA on the one hand, and the schools covered by Section 504 and ADA provisions concerning higher education students on the other, also suggest the appropriateness of deference. The IDEA essentially applies to public preK-12 schools.³¹¹ The IDEA is a government-funded program which applies to schools which are governmental entities.³¹² It is government regulating government. Moreover, IDEA-covered public preK-12 schools are not ones that are thought to possess either institutional or individual faculty academic freedom in the same way as higher education institutions and faculty members do. Students attend IDEA-regulated public preK-12 schools, at least in part, to comply with state compulsory education laws; they have not chosen to attend. However, and again unlike higher education, under state laws, there is a legal right (under state statute if not also under the state constitution) to attend public preK-12 school,³¹³ while enrollment in public or

U.S. at 225; holding that a school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field where the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession'" (quoting *Doherty*, 862 F.2d at 576)).

308. See *supra* notes 100–101 and accompanying text.

309. See *supra* note 102 and accompanying text.

310. See *supra* notes 70–72 and accompanying text (private lawsuits available without regard to whether an administrative complaint has been processed, and the result of any administrative proceedings are not given any particular role in the litigation).

311. See *supra* note 84 and accompanying text.

312. See *supra* notes 83–84 and accompanying text.

313. For an overview of state compulsory education laws, see JAMES RAPP, EDUCATION LAW § 8.03 (2005).

private higher education is a privilege. In contrast, many higher education institutions are private. Private or not, higher education institutions clearly enjoy academic freedom both at the institutional and individual faculty level.³¹⁴ Section 504 and the ADA offer no specific government funds to subsidize providing accommodations and the other costs of compliance. Higher education program enrollment is optional.

The IDEA is helpful in providing guidance in one area: the plethora of disputes concerning the application of imprecise statutory standards to specific cases that would occur if there were close judicial review of academic decisions regarding students with disabilities, rather than deference to those decisions. Like Section 504's and the ADA's imprecise terms, such as limiting coverage to impairments which "substantially" limit a major life activity and "reasonable" accommodations or adjustments, the IDEA's own imprecise terms entitle students to an "appropriate" education in the "least restrictive environment."³¹⁵ The imprecise and subjective nature of the statutes' coverage and entitlements and the "otherwise qualified" limitation also suggest that Congress meant for schools to operate with some discretion.³¹⁶ This imprecision also invites disputes over whether statutory obligations have been met. Under the IDEA, the combination of close administrative and judicial review, and the imprecise statutory standards, has in fact resulted in an enormous amount of litigation.³¹⁷

The limits courts have put on deference, particularly the "factual record of introspection" limited deference standard in the First and Ninth Circuits, provide sufficient protection for students claiming disability discrimination.³¹⁸ Requiring a school to carefully consider disability and other information concerning a student with a disability, and to create a record of those decisions, helps to ensure that a school will give disability information the reasoned and informed consideration the law requires and make a good faith readmissions decision. Whether or not this limited deference standard is applied, affirmative evidence of any discriminatory (stereotypical, bad faith, or retaliatory) thinking by a school³¹⁹ or refusal to consider disability information will likely result in a triable issue of fact precluding summary judgment, but the mere fact of denying readmission to a student with a disability³²⁰ will not be sufficient for her discrimination claim to withstand a

314. See *infra* Section VII.A.3.

315. See *supra* notes 96–97 and accompanying text.

316. See, e.g., *supra* notes 49–55 and accompanying text (setting out requirements that eligible persons be "qualified" and that they are entitled to "academic adjustments," but not those that would alter basic essential program requirements).

317. The Individuals with Disabilities Law Reporter (IDELR), a loose leaf service which collects court and hearing officer decisions under the IDEA, had forty-three volumes from 1978, when the IDEA took effect, through September 2005. Recent IDELR volumes numbered over 1000 pages each.

318. See *supra* Section V.C.3.

319. Evidence of discriminatory thinking can be obtained by the student using discovery or perhaps through the investigation process if an OCR complaint is filed.

320. Nor, apparently, will allegations that other students similarly situated were treated differently.

summary judgment motion.³²¹

VII. DOING THE RIGHT THING: GUIDELINES AND OPTIONS FOR MAKING
PRINCIPLED, NONDISCRIMINATORY READMISSIONS DECISIONS WHEN STUDENTS
CLAIM A DISABILITY

A. The Consequences of Going Beyond Statutory Requirements

Law schools may consider doing more than the statutes require in one or more of three ways. First, law schools may choose to serve some students with impairments that do not amount to statutory disabilities. Second, law schools may offer more than statutorily required reasonable accommodations to students with (statutory or nonstatutory) disabilities. Third, law schools may choose to apply the readmissions standard more leniently to dismissed students with (statutory or nonstatutory) disabilities. Some parent universities of law schools may wish to make one or more of these choices for the university, including the law school.

While choosing to go beyond statutory requirements would not appear to open law schools up to reverse discrimination claims by students without disabilities,³²² other considerations including law school accreditation requirements, issues of academic freedom, potential triggering of additional disability law obligations, and even potential tort and contract liability limit, and to some extent, caution against going beyond statutory requirements. Moreover, the equities do not clearly favor doing more than the statutes require.

1. The equities

From the perspective of the student with a statutory or nonstatutory disability, the equities weigh heavily in favor of serving students with diagnosed impairments even if they do not amount to statutory disabilities, providing academic adjustments even if they go beyond legally required ones, and applying the readmissions standard leniently to students with statutory or nonstatutory disabilities. For example, the student in *Wong* whose dyslexia has caused him to read very slowly, but whose impairment does not amount to a statutory disability, has an equitable argument that failure to offer him extra time on exams will mean that the exam will measure his slow reading speed more than his mastery of the course material. A dismissed law student with a newly diagnosed impairment and

321. See *supra* notes 134–135 and accompanying text.

322. Other discrimination laws such as Titles VI, VII, and IX, prohibit discrimination “on the ground of” race or gender. See, e.g., 42 U.S.C. § 2000d (2000) (Title VI prohibition “on the ground of race, color, or national origin”). Some laws have been interpreted as prohibiting discrimination against either gender, and against any racial minority or majority group. See, e.g., *Gratz*, 539 U.S. 244 (holding that affirmative action program amounts to illegal race discrimination against white applicants). But see 29 C.F.R. § 794(a) (2006) (Section 504) (in which the ADA defines the group of covered persons with statutory disabilities, and prohibits discrimination against the covered group).

who has thus never had accommodations, such as Student in the illustrative scenario, may also argue as a matter of equity that if she can demonstrate a real possibility of success with accommodations, the school should offer her a second chance even if there is not the convincing likelihood of success required by the School's readmission standard.

While these arguments are cogent ones, there are competing concerns and counter arguments also centered on equity and fairness. As a threshold matter and as discussed below,³²³ from the perspective of the law school faculty, maintaining academic standards is primary. It does no one any good, most of all the dismissed student, to readmit her if there is not a good faith belief she will succeed, not only by maintaining required grades while in law school but also by passing the bar exam and practicing competently. As one court observed in a non-law school case, granting a degree (and readmission in the shorter term) conveys the school's imprimatur that the student can and will be successful in these ways.³²⁴ As discussed below,³²⁵ accreditation standards also bar law schools from readmitting students unless they are likely to succeed the second time around.

Beyond this mandated limitation of readmission of any student to those who are likely to succeed, with or without a disability, law schools have some discretion in deciding how to apply readmissions standards to students with disabilities and still comply with disability law. The faculty may believe equity among all the school's students is best served by holding everyone to the same standards, particularly as regards extra time on exams, except when disability laws require academic adjustments, for a number of reasons: the nature of law school grades, line-drawing concerns, concerns about test validity and skills needed for successful law practice, risking future failure on the bar exam and in practice for the student provided with non-required accommodations.

As to offering academic adjustments to students without statutory disabilities, or beyond legally required reasonable accommodations, it is important to note that this decision is qualitatively different than other sorts of affirmative action that considers diversity of various kinds (race, gender, disability, etc.) in making initial admissions decisions. This latter sort of affirmative action is done in the context of deciding which qualified students will be offered an opportunity for legal education. Once such students are admitted, they are held to the same academic standards as all other students; there is no individualized adjustment of academic standards.

In contrast, offering some law students academic adjustments which go beyond legally required reasonable accommodations (for example, giving extra time on exams to a student with a reading disorder impairment primarily involving slow reading speed which is not a statutory disability) gives individual students an

323. See *infra* notes 347–349 and accompanying text.

324. Cf. Milam & Marshall, *supra* note 107 (“Graduate and professional schools owe a duty to the public, the student and the respective professions to assure that they award degrees only to qualified individuals. The same obligation compels institutions to dismiss those not qualified to practice.”).

325. See *infra* Section VII.A.2.

academic experience and in some cases an evaluation of their performance which is different than those for most students. In a graduate school program where grading is criterion-based (i.e. excellent work receives a grade of “A,” no matter how the other students perform), such a practice might affect the individual student (her grades might overestimate her performance), but would probably not have much impact on the other students. The great majority of law schools, however, have mandatory grade curves which mean that law school grades are largely normative, measuring how the student performed relative to her classmates.³²⁶ Thus, in law school there is special risk that academic adjustments beyond legally required ones unfairly disadvantage other students. A legal commentator notes “a general sense of unease . . . about whether the various accommodations afforded for learning disabilities truly ‘level the playing field’ in a meaningful and valid way, or instead serve to provide unfair advantages to some. In some cases, . . . a strong suspicion of ‘gaming the system’ arises.”³²⁷

Hence, a law school may decide not to go beyond statutory requirements because it believes the fair and equitable thing is to hold all students to the same academic standards except as required by law.

Law schools may also be concerned about the impact of the specific academic adjustment of extra time on exams on the validity of scores on those exams, and thus wish to limit that adjustment to circumstances where it is legally required. Commentary by some disability experts corroborates this concern. It is not documented, for example, that the accommodation of additional time on exams for students with disabilities does not impair test validity.³²⁸ Some research with extra time on the SAT suggests the extra time compromises its predictive validity.³²⁹ Other research suggests that extra time and quiet rooms “increases the testing scores of all test takers.”³³⁰ One commentator notes, for example, that if an exam is speeded, an extra time accommodation “would be unfair to the applicants

326. See Nancy Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 417–18 (Sept. 1994) (observing that two-thirds of law schools in a national survey report some sort of grade curve).

327. Murphy, *supra* note 45, at 46.

328. See, e.g., Tucker, *supra* note 47, at 17 (assuming test anxiety is a legal disability, providing extra time as an accommodation does reduce anxiety for the examinee, creating, the “paradox . . . of a non-anxious examinee with extra time”); Ranseen, *supra* note 46, at 8–9 (observing that “there is no evidence that an accommodation of extra time does not alter test validity,” and all examinees afforded additional time improved their performance); Gordon, Murphy & Keiser, *supra* note 46, at 35 (“Unlike accommodations such as wheelchair ramps or elevator signs written in Braille, ADHD accommodations are universal in their potential benefit even for people without the disorder.”); *id.* (“In the case of ADHD there is no scientific research nor theoretical basis to indicate that extra time on an exam is necessarily helpful.”).

329. Susan Phillips, *High-Stakes Testing Accommodations: Validity versus Disabled Rights*, 64 BAR EXAMINER 8, 23 (1995) (finding that research indicates that SAT scores of learning disabled students given extra time predicted higher freshman college grades than those students actually received).

330. Robin Ballard & Amiram Elwork, *Accommodating Learning Disabled Applicants During Bar Examinations: What is Reasonable Under the ADA?*, 74 BAR EXAMINER 31, 34 (2005).

without disabilities.”³³¹ Experts note that when diagnosing an impairment and recommending accommodations, evaluators “gear their efforts toward helping their patients feel better . . . and will not tend to worry terribly much . . . about the ultimate implications of lax standards for test integrity or simple fairness for all.”³³²

Another commentator, an education professor with a J.D. and a doctorate in psychometrics, examines the impact of test accommodations for examinees and concludes that while test accommodations for persons with physical disabilities do not reduce test validity, accommodations for examinees with mental disabilities may in fact compromise test validity.³³³ Standards of professional associations for educators and psychologists indicate that, “[u]nless it has been demonstrated that the psychometric properties of a test . . . are not altered significantly by some modification, the claims made for the test . . . cannot be generalized to the modified version.”³³⁴

More generally, other disability experts note success on exams without accommodations may correlate with skills needed by practicing attorneys, specifically suggesting that attorneys need to remain attentive for long periods, be able to “sustain mental effort” for long periods, and “work under pressure.”³³⁵ Some experts note that “some learning disabilities (e.g., reading disorders) involve mental functions that are inherently relevant and critical to the practice of law,”³³⁶ and thus accommodations “may mask certain disabilities that are important to the practice of law and simply make it easier for learning disabled applicants to pass the bar examination.”³³⁷ These experts posit that mental processing speed and distractibility, which test accommodations attempt to compensate, may in fact be relevant to law practice, which involves “researching, understanding, retaining, and applying an enormous amount of highly complex legal information. . . . [L]awyers must be able to pay a great deal of attention to detail, . . . express themselves clearly . . . often under time pressure and in emotionally charged situations, . . . [and possess] quick thinking and the ability to focus.”³³⁸ Thus, “the presence of a learning disability may impede a person’s ability to practice law.”³³⁹

331. Duhl & Duhl, *supra* note 45, at 14.

332. Gordon, Murphy, & Keiser, *supra* note 46, at 29.

333. Phillips, *supra* note 329, at 8.

334. *Id.* at 12 (citations omitted) (noting the small populations given modified exams make any empirical research on this issue difficult at best, and suggesting in deciding requests for test accommodations, the test’s purpose, skills to be measured, and inference to be drawn from the score should all be considered).

335. John Ranseen & David Campbell, *Adult Attention Deficit Disorder: Current Concepts and Controversies*, 65 BAR EXAMINER 49, 54 (1996).

336. Ballard & Elwork, *supra* note 330, at 31.

337. *Id.*

338. *Id.* at 33.

339. *Id.*

“Licensing boards should assume that some learning disabilities can significantly impede an applicant’s ability to practice law effectively. The public interest is protected not by using measuring methods that assess the applicant’s potential abilities, but by employing those methods that attempt to determine how the applicant will

Returning to the student without a statutory disability but with disorder-related slow reading speed, the law school may also understand that its students' reading speed varies greatly and for myriad reasons (students' overall information processing speed, their reading skills, their temperament, their interest in the material, or their work ethic) and determine that it is not equitable to provide extra time on exams only for students whose slow reading speed is related to an impairment and not caused by other reasons. The faculty may be concerned about line drawing, specifically about how far to go in tailoring education and evaluation to each student's strengths and weaknesses. If a student has a diagnosed impairment of dyslexia that does not amount to a statutory disability, should the student have extra time for her exam? If so, does equity also require postponing the same exam for a student who is recovering from a virus, or for a student who had a fight with her significant other? A disability expert questions whether a "low-achieving student" who would likely perform better on an exam with extra time "is less deserving of the opportunity to demonstrate maximum performance than is a student who has been labeled learning disabled."³⁴⁰ Similarly, the faculty may not find it administratively, or perhaps financially,³⁴¹ workable to tailor education and evaluation beyond the ways that the statutes require, particularly given the large size of most law school classes.

A law school might also conclude that the student with a non-statutory disability is not served well by offering adjustments that will not be available later in life to the student. As earlier parts of this article make clear, bar examiners typically do not offer accommodations beyond those which are legally required, and have disability experts trained in the relevant legal standards to review requests for accommodations.³⁴² Employers are required only to offer reasonable workplace accommodations to employees with statutory disabilities.³⁴³ Some commentators and attorneys with disabilities suggest that rigorous application of academic standards, presumably including readmission, is in the best interests of students with disabilities as well as other students. One commentator, referring to the post-law school experiences and opinions of several law school graduates with disabilities, suggests that:

Schools do their students a disservice by allowing them to become dependent upon accommodations such as extra time that will not always be available in practice. As one learning disabled graduate . . . noted, 'I thought [school] was the big hurdle. But it turns out it isn't. . . . I really

actually serve his or her clients."

Id. at 34.

340. Phillips, *supra* note 329, at 12. "To minimize the potential for an invalid inference, a test user may want to grant only those accommodations judged essential." *Id.* at 14.

341. Section 504 and the ADA offer no funds to cover any of the costs of compliance. *See supra* note 83 and accompanying text.

342. For commentary on accommodations approved by disability experts and used by bar examiners, see notes 94–100 and accompanying text.

343. *See* 34 C.F.R. § 104.12 (2006) (reasonable accommodations for employees required under Section 504); 42 U.S.C. § 12112(5) (2000) (reasonable accommodations for employees required under ADA).

don't see that I'm ever going to eliminate the fact that I take twice as long to do things as other people.' This student would have been better served had he received counseling, before graduation, from someone like Paul Grossman, the OCR attorney described . . . above. [Grossman] acknowledges that he has to work on weekends, holidays, and over vacations. He does so willingly, however, because he loves his work. Similarly, many learning disabled law students succeed academically simply by studying longer and more intensely than their classmates. Of course, in law practice, in which the average non-disabled practitioner already works long hours, it is extremely demanding to self-accommodate in this way. Thus, students preparing for practice should be counseled that the demands on their time in practice will be even greater than those in law school.³⁴⁴

Another commentator suggests that "students who make individual agreements with professors to remain in the university often may be postponing academic dismissal . . . and increasing likelihood of a lawsuit when the student is eventually dismissed."³⁴⁵ In *Ewing*, the evidence was that "[Ewing] often beguiled his professors into allowing him to postpone or retake examinations or to ignore certain of his low mid-semester scores so as to raise his overall course average."³⁴⁶

2. Accreditation requirements

Law school accreditation requirements impose two relevant limitations: 1) law schools cannot readmit students that they do not predict will be both academically successful and capable of passing the bar exam and meeting other licensing requirements, and 2) law schools must set their own educational policy, which includes setting and applying academic standards for dismissal and readmission.

Law schools operate under ABA and AALS accreditation standards that prohibit them from readmitting students unless they believe the students will be successful.³⁴⁷ A law school cannot readmit a student, with or without a disability,

344. Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 61-62 (1997) (citations omitted).

345. Milam & Marshall, *supra* note 107, at 350-51 & n.108.

346. Petition for Writ of Certiorari at 5, *Ewing*, 474 U.S. 214 (No. 84-1273).

347. A.B.A. Standards for the Accreditation of Law Schools provide in relevant part: "Standard 501. ADMISSIONS . . . (b) A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." *Standards, Rules of Practice for Approval of Law Schools*, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 35. The standards further provide:

Standard 505. PREVIOUSLY DISQUALIFIED APPLICANT. A law school may admit or readmit a student who has been disqualified previously for academic reasons upon an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school. . . . For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

that the law school does not believe will be academically successful. Accreditation standards also limit admissions and retention decisions to law schools acting through their faculty and dean;³⁴⁸ thus, universities cannot readmit law students. These accreditation standards also reserve to the law school “academic standards for retention, advancement, and graduation of students,” and provide that while “[a] law school may involve alumni, students, and others in a participatory or advisory capacity; . . . the dean and faculty shall retain control over matters affecting the educational program of the law school.”³⁴⁹

Hence, to the extent academic adjustments would be involved, a law school’s parent college or university cannot unilaterally choose to go beyond statutory requirements in certain academic respects for law students. Specifically, a college or university cannot unilaterally decide to offer academic adjustments to a law student without a statutory disability (for example, unilaterally offering extra time on exams to a student whose learning disability does not substantially impair her learning or other major life activities), nor unilaterally offer academic adjustments to students with statutory disabilities which are beyond statutory reasonable accommodations (for example, unilaterally offering a waiver of attendance requirements to a student with quadriplegia). These decisions can only be made by the law school.

Standards, Rules of Practice for Approval of Law Schools, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 37.

AALS Standard Section 6-2(a) Admissions provides in pertinent part: “a. A member school shall admit only those applicants whose applications have been evaluated pursuant to a process consistent with Bylaw 6-3 and who appear to have the capacity to meet its academic standards.” *Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership*, AALS HANDBOOK (Aug. 2005), available at http://www.aals.org/about_handbook_requirements.php.

348. ABA Law School Accreditation Standards and interpretations provide in relevant part:

Standard 204. GOVERNING BOARD AND LAW SCHOOL AUTHORITY. a) A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards. b) The dean and faculty shall formulate and administer the educational program of the law school, including curriculum; methods of instruction; admissions; and academic standards for retention, advancement, and graduation of students; and shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty.

Standards, Rules of Practice for Approval of Law Schools, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 12.

Interpretation

204-2:

Admission of a student to a law school without the approval of the dean and faculty of the law school violates the Standards. (December 1975; 1994; August 1996).

Id.

Standard 206. ALLOCATION OF AUTHORITY BETWEEN DEAN AND FACULTY. The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.

Id. at 13.

349. *Id.*

3. Academic freedom issues³⁵⁰

Academic freedom protects both higher education institutions and individual faculty. There are several types of academic freedom claims. For example, academic freedom claims may be made by institutions against the government, such as in the Supreme Court case in which universities unsuccessfully asserted that the Solomon Amendment limited their academic freedom.³⁵¹ In the disability context, either faculty or institutions might assert that disability discrimination laws, which uniquely among discrimination laws impose obligations to make academic adjustments for covered students,³⁵² impinge on their academic freedom. The Supreme Court has indicated, however, that academic freedom does not extend to noncompliance with discrimination laws, noting that while it generally defers to academic judgments, this “principle of respect [is] for *legitimate* academic decision-making [sic],” which the Court indicated would not include illegal discrimination.³⁵³

Finally, and most relevant to this article, there are academic freedom claims between faculty and their employing colleges or universities. Specifically, faculty who are told of academic adjustments for their students might assert infringement of their individual academic freedom. Such claims might be enforced via lawsuit,³⁵⁴ and/or by a grievance under a labor contract or faculty handbook, or a complaint to accrediting agencies or professional organizations such as AAUP. The outcome of such claims seems clear if the academic adjustments are required by discrimination laws: academic freedom does not trump the obligation to comply with such laws.

If, on the other hand, the academic adjustments go beyond those which are legally required, the outcome may be different. As one commentator notes, institutional academic freedom is protected as the collective of individual faculty academic freedoms:

[C]ourts’ willingness to defer to [institutional] policies is in large part a

350. More than a cursory discussion of academic freedom issues is beyond the scope of this article. For more extensive general discussion of academic freedom issues, see J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989). For a brief discussion of individual and institutional academic freedom issues and disability, see Claire McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 639–41 (1995). For a more extensive discussion, see Leonard, *supra* note 117.

351. *Rumsfeld v. Forum for Academic and Inst’l Rts., Inc.*, 126 S.Ct 1297 (2006).

352. See *supra* Section VII.A.1.

353. *Univ. of Penn. v. Equal Empl. Opportunity Comm’n*, 493 U.S. 182, 199 (1990) (noting that private university’s academic freedom does not include right to keep peer review documents from EEOC in connection with a tenure applicant’s discrimination claim); *id.* at 199 n.7 (defendant university does not assert race or gender are “academic grounds” for academic freedom purposes); *id.* at 198 (precedent cases on academic freedom involve “direct infringements on the asserted right to determine for itself on academic grounds who may teach”).

354. One commentator references a lawsuit filed by a mathematics professor who was told to provide extra time on an exam to a student with a disability. Laura Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J.C. & U.L. 471, 473 (1991).

consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty admissions committees). In a very real sense, then, the *institutional* academic freedom recognized in many judicial opinions may be viewed as the sum of acts of *individual* faculty academic freedom.³⁵⁵

This means that the individual faculty member's academic freedom likely does not extend to noncompliance with faculty-approved academic policies (such as, for example, a mandatory grade curve). It also means that institutional judgments by administrators rather than faculty may not have the protective armor of academic freedom and, thus, may be overridden by the individual faculty member's academic freedom. Consequently, one important issue in academic freedom claims involving nonstatutorily required academic adjustments would be who made the decision to provide the non-required academic adjustments. If the law school faculty had voted to go beyond statutory requirements, precedent cases suggest requiring compliance with faculty-approved academic policies would not violate individual dissenting faculty's academic freedom.³⁵⁶ If, on the other hand, nonacademic university officials attempted to make such a decision, the faculty member would seem to have a colorable claim of infringement of academic freedom, in addition to the violation of accreditation standards described above.

The Ninth Circuit provided helpful guidance on these issues in the context of a professor's successful challenge to his discipline pursuant to his school's sexual harassment policy.³⁵⁷ In that case, the Ninth Circuit held that higher education discrimination policies which are vague and/or overbroad "impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . [and] discourage[] the exercise of first amendment freedoms."³⁵⁸

4. Triggering additional disability law obligations

If a law school chooses to serve students with impairments that do not amount to statutory disabilities, and/or to make accommodations beyond the statutorily required ones, additional obligations under disability law may be triggered. First, serving students with impairments that do not amount to statutory disabilities, and who therefore are not covered by disability laws, may suggest that the law school "regards" such students as having a disability within the meaning of the statute.³⁵⁹

355. STEVEN POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 102 (The Johns Hopkins University Press ed.) (2002).

356. See, e.g., *Wozniak v. Conry*, 236 F.3d 888 (7th Cir.), *cert. denied*, 533 U.S. 903 (2001) (finding that academic freedom of faculty member was not violated by requiring compliance with faculty-approved grading policies).

357. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996).

358. *Id.* at 972.

359. As discussed earlier in the article, persons who are regarded as having a disability are covered by the statutes as well as persons who actually have statutory disabilities. See *Sutton*,

Federal appeals courts are currently split on whether there are reasonable accommodation obligations toward persons who are regarded as having a disability. Relying primarily on the plain language of the statutes, which impose affirmative obligations equally on persons who actually have statutory disabilities and who are merely regarded as having statutory disabilities, the First,³⁶⁰ Third³⁶¹ and Tenth Circuits³⁶² have held that reasonable accommodation obligations include persons regarded as having statutory disabilities. The Fifth,³⁶³ Sixth,³⁶⁴ Eighth³⁶⁵ and Ninth³⁶⁶ Circuits have rejected accommodation obligations toward “regarded as” persons, because those courts perceive “bizarre results” would result from imposing such obligations.³⁶⁷ Thus it appears that in some circuits a law school can, by serving a student who does not have a statutory disability, assume nondiscrimination and reasonable accommodation obligations to that student. A law school may be able to avoid this scenario by documenting to such students that while the school is choosing to serve them, the school does not believe that they have statutory disabilities. For example, in the illustrative scenario, if the law school decides to readmit dismissed Student but does not believe she has a statutory disability, it might choose to offer her accommodations, while at the same time clarifying with her that it does not perceive her as having a statutory disability.

Somewhat similarly, if a law school chooses to offer services to a student with a statutory disability beyond those which are statutorily required reasonable accommodations, the school’s obligations may indirectly become enhanced. If, for example, a school offers a student with a disability a waiver of class attendance requirements (which normally would be an essential requirement for law students and thus not subject to reasonable accommodation), it does not necessarily waive an argument a school might make in the future about its legal obligations. As one court has noted, making concessions neither obligates a school to do something in the future, nor renders the concession legal reasonable accommodations.³⁶⁸ However, a jury may find making an accommodation to be persuasive evidence that it is a reasonable accommodation.³⁶⁹ Moreover, a law school which offers

527 U.S. at 489–94. The Court in *Sutton* clarified that persons “regarded as disabled” are those who are perceived as having a statutory disability when in fact they do not have an impairment, or their impairment does not amount to a statutory disability. *Id.* In *Sutton*, the employee did not fall into this category since there was no evidence that her employer perceived her as having a statutory disability. *Id.*

360. *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996).

361. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773–76 (3d Cir. 2004).

362. *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 675 (10th Cir. 2005).

363. *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

364. *Workman v. Frito-Lay Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

365. *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999).

366. *Kaplan v. City of Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 1996).

367. *See id.* (noting that it would be a “perverse and troubling result” if “impaired [but not actually disabled] employees would be better off under the statute if their employers treated them as disabled even if they were not”).

368. *See Wong I*, 192 F.3d at 820.

369. *See id.*

tutoring or other personal services to students must offer those services on a nondiscriminatory basis to students with disabilities.³⁷⁰ Thus, for example, making tutoring available to an impaired but not statutorily disabled law student triggers an obligation to make tutoring available on a nondiscriminatory basis to students with statutory disabilities.

5. Potential tort and contract claims

A student who is wrongfully readmitted (that is, readmitted when there is not a good faith basis for believing she will be academically successful) and who does not in fact succeed after paying the law school additional tuition rather than earning income or pursuing a different educational or training program may file tort and/or contract claims against the school. While courts have rejected claims sounding in educational malpractice for public policy reasons, claims of misrepresentation³⁷¹ (that, given the accreditation standards discussed above, readmission amounts to an affirmative representation by the law school of its belief that the student will succeed) and/or breach of the implied covenant of good faith and fair dealing in the contractual relationship between the student and the school³⁷² may be viable.

Faculty who teach students that receive nonstatutorily required academic adjustments without their consent may also have contractual claims in addition to those surrounding their academic freedom. Some faculty handbooks or labor contracts may offer faculty the opportunity to grieve not just violations of school policy, but more generally, decisions that the faculty member believes are wrong.³⁷³

B. Guidelines for Complying With Disability Discrimination Statutes In Readmissions Cases

1. Verify the existence of a statutory disability

It has long been clear that higher education students are responsible for self-identifying as having a disability and for providing appropriate documentation of their disability.³⁷⁴ More recently, the Court's decisions requiring that mitigators be considered in determining whether the impairment is a statutory disability, and especially its *Toyota* decision emphasizing the requirement that the impairment "substantially limit" a major life activity as compared to the average person in

370. See Oregon State Univ., 5 NDLR 19 (OCR 1993); *supra* notes 60–61 and accompanying text.

371. See generally JAMES RAPP, 5 EDUCATION LAW § 12.05[4] (2006).

372. See generally *id.* at § 12.05[5].

373. At the author's university, for example, the faculty handbook makes available a grievance process culminating in binding arbitration for decisions the faculty member believes to be "unfair, unjust, or in violation of University policy." GONZAGA UNIVERSITY FACULTY HANDBOOK § 307.02a.

374. See *Wong I*, 192 F.3d at 826.

order to be a statutory disability, make it clear that having a diagnosed impairment is not necessarily equivalent to being a statutorily covered person with a disability.³⁷⁵

Most of the disputes in the readmissions cases precede the Court's 2002 *Toyota* decision interpreting "substantially limits." Perhaps in part for this reason, when there was a documented impairment, most of the schools in the readmission cases did not dispute whether the complaining student was a statutorily covered person with a disability.³⁷⁶ In appropriate future cases, as illustrated by *Wong II* and *Marlon*, law schools may well challenge whether a dismissed student who claims that a "disability" caused her academic failure actually has a statutory disability.

Whether a dismissed student has a physical or mental impairment is not an issue about which law school faculty normally have expertise. However, the law school can insist on documentation that the dismissed student claiming a disability has a diagnosed impairment, and that the impairment, with mitigators, does in fact substantially impair a major life activity. Commentary by both legal scholars and disability experts suggests that few law students' newly diagnosed learning disabilities or ADHD will meet the post-*Toyota* "substantially impairs" standard, since few such students' learning disabilities substantially limit their learning in comparison to the average learner.³⁷⁷ Similarly, a student with a broken (writing) arm may not have the long-term or permanent substantial limitation of writing that the *Toyota* Court appears to require.³⁷⁸ A student with a mental illness such as bipolar disorder, which is successfully treated with medication, may not have substantial impairment with the medication mitigator. On the other hand, if the medication has significant negative side effects, such as rendering the student unable to think clearly at certain times of day, those side effects must be considered in determining if the student has a statutory disability.

In the illustrative scenario, Law School has undisputed evidence that Student has the impairment of dyslexia, and the readmissions committee has neither the expertise nor any informational basis to dispute the diagnosis. If the committee has questions about the diagnosis, it may consult with disability experts within the university, such as the disability services office, and in appropriate cases might ask the student for permission to speak with Evaluator, obtain additional information from Evaluator, or even obtain an additional evaluation or outside expert review (if from a person of the school's choosing at the school's expense). Otherwise, disputing the diagnosis suggests the committee is improperly operating based on stereotypes.

As discussed above, however, having an impairment and being a statutorily protected person with a disability are not the same thing; the impairment must,

375. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. 184, 196–98 (2002).

376. See, e.g., *Anderson v. Univ. of Wis.*, 841 F.2d 737 (7th Cir. 1988) (student claiming alcoholism as disability); *Alison v. Howard Univ.*, 209 F. Supp. 2d 55 (D.D.C. 2002) (student claiming "temporary emotional distress" as disability); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995) (student claiming "adult child of alcoholic" as disability).

377. See *supra* notes 45–48 and accompanying text.

378. *Toyota*, 534 U.S. at 198 (2002) (citing 29 CFR §§ 1630.2(j)(2)(ii)-(iii) (2006)).

with mitigators, substantially impair a major life activity such as learning.³⁷⁹ The evidence provided in the illustrative scenario suggests the impairment does not amount to a statutory disability. Student has apparently used self-mitigators (coping strategies) in the past, with success; these must be considered in the analysis. With a B average in college in a subject area which involves substantial reading and without any accommodations, and an LSAT high enough to gain admittance to Law School, Student's record indicates that Student's prior learning, and thus overall learning, may not have been substantially limited. Any factual findings by Evaluator about the extent to which the impairment affected Student should normally be accepted, but to the extent the committee has additional information on this point (e.g. the undergraduate success), that additional information is also relevant.

The person with the expertise and responsibility for making the legal determination of the presence of a statutory disability will vary from one law school to another; perhaps it is the university disability services office, perhaps the committee, perhaps university counsel.³⁸⁰ What is clear is that: 1) Evaluator's diagnosis of an impairment is not necessarily sufficient, and 2) Evaluator lacks the expertise and responsibility for determining that the impairment amounts to a statutory disability.³⁸¹

2. Carefully document consideration of the case by a faculty committee and/or the full faculty

The court cases also provide substantial guidance as to what constitutes a nondiscriminatory readmissions process when a law student claiming a disability is involved, and specifically what will trigger judicial deference to the school's judgment not to readmit. The cases announce a policy of deference when the school's judgment is a careful, truly academic one; a factual record of introspection about the basis for the decision and the consideration of disability information is specifically required by some courts.³⁸² The Supreme Court decision in *Grutter* is significant in that it accords deference to a law school's academic judgment in the context of a race discrimination claim, which would otherwise require strict judicial scrutiny. Conspicuously, the *Grutter* Court deferred to a law school faculty-approved, subjective, holistic admissions policy tied to specific academic needs.³⁸³ In a companion case, the Court did not defer to

379. See *supra* Section III.A.2.

380. See James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 34 (1996) (suggesting that status of dismissed student as a person with a disability is not an academic judgment and courts will not defer to school's determination on this issue).

381. The committee may decide to proceed on the explicitly stated assumption, without itself finding, that Student is a statutorily protected person with a disability. If the committee decides to do so, and/or to go beyond statutory requirements in treating a readmissions petitioner as disabled, it should note that in its report so the full faculty can engage in meaningful review.

382. See *infra* Section V.C.3.

383. See *Grutter*, 539 U.S. at 315–16.

an undergraduate admissions policy created by nonacademic administrators, which was neither subjective nor holistic and was not tied to specific academic needs.³⁸⁴ These cases counsel law schools, when setting and applying standards for dismissal and readmission to do so as a faculty, or as a committee with delegated authority from the faculty, rather than as a decision by a single administrator or administrative group.³⁸⁵ They further counsel that law schools should set and apply standards that are tied to the law school's academic integrity and needs, in ways which are documented by the law school.³⁸⁶ It is clear from a review of relevant authority that neither a court nor OCR will normally second guess generally applicable readmissions standards.

Most law schools appear to assign at least initial responsibility for evaluating readmissions petitions to a faculty committee, with some schools delegating actual decision making authority to the committee.³⁸⁷ While no court or OCR opinion has questioned the decision by committee approach, there are advantages to faculty-wide decisions. Reserving the decision to the full faculty, with a recommendation from a committee, helps avoid the appearance of bias by individual/small groups in some of the cases discussed earlier,³⁸⁸ which posed difficulty for the schools, and ensures consistency of application of the readmission standard from one year to the next.

3. Make a decision that is holistic and considers context

The cases also emphasize that deference is appropriate when academic decisions are made holistically and in context. Thus, it is appropriate for law schools to use context, both school-wide and student-specific, to make readmissions decisions, and to document that context. At the school-wide level,

384. See *Gratz*, 539 U.S. at 253.

385. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997) (applying *Wynne* limited deference standard to determine whether course substitutions were reasonable accommodations or altered essential academic standards; University Provost's unilateral determination, based in part on stereotype and bias, was insufficient); *id.* at 154 (ordering university to convene a faculty committee to make this determination).

386. For example, if a law school's bar passage rate is of concern, and/or its own internal research indicates recently readmitted students have largely been unsuccessful, those may be reasons to have a tough readmissions standard and to apply it strictly. A law school in such a situation should document these reasons for its approach to readmissions. *Cf.* Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (OCR deferring to and upholding law school's decision not to readmit student in part because school's judgments and resulting rules concerning minimum GPAs and opportunities for readmission were based on past successes of students with low GPAs, the school's bar pass rate, and a desire to avoid taking tuition from students whose prognosis for academic success, success on the bar exam, and competence in practice was poor, and were recommended by a faculty committee and adopted by the full faculty).

387. The author is unaware of any law schools that leave readmissions decisions to a single person, as was problematic for the medical schools in *Singh* and *Steere*, and unaware of law schools whose parent university has the power to overturn the law school faculty's decision on readmission. The latter would appear to violate accreditation standards as discussed earlier in Section VI.A.2.

388. See *supra* Section V.C.1.

for example, the law school may have data on the law school grades and/or bar exam performance of readmitted students from past years and may accordingly adjust its readmissions standards and/or how strictly it applies them to current petitions. Law schools also operate under ABA accreditation standards that prohibit them from readmitting students unless the school believes the student will be successful.³⁸⁹ Law schools may also wish to consider the extent to which faculty and other resources are available to help marginal students succeed. At the student-specific level, the law school has a wealth of information about each petitioning student, most importantly the feedback of the faculty who have actually instructed and evaluated the student, and, if applicable, the student tutors who have worked with the petitioning student, perhaps in an academic resource program. The law school also has information from the student's file including the student's LSAT score and undergraduate grades, as well as the student's actual exam answers and numerical data comparing the student's exam and course grades with those of classmates. Several decisions, including *Horowitz* and *Ewing*, teach that documentation of this complex basis for each readmission decision is crucial.³⁹⁰ While collecting and synthesizing this information and memorializing the basis for the decision is time consuming, it is crucial to assist the school in making both correct and legally defensible readmissions decisions.³⁹¹

4. Give reasoned and informed consideration to disability information, with appropriate confidentiality

To the extent a petitioning student submits disability information, it must be considered in a reasoned and informed way. As discussed below, however, the committee need not and should not defer to the disability information to the extent it offers an opinion on an academic issue, such as the student's ability to succeed if readmitted, or a legal issue, such as whether the student has a statutory disability. Normally, the disability information submitted by a student is an evaluator's report containing a diagnosis and recommendations addressed to the committee, written so that it can be readily understood by law faculty. The court decisions and OCR opinions do not suggest that under usual circumstances the school needs to consult with technical experts in order to interpret disability information.³⁹² In fact, a

389. See *supra* note 307 and accompanying text.

390. See *supra* notes 112–25 and accompanying text.

391. As discussed earlier, most law school readmissions decisions are made over the summer, when most law faculty are not on contract. Therefore, it may be tempting to do this often uncompensated work over the summer break in a less than completely thorough fashion. The author suggests that readmissions work is important and time consuming enough to compensate nine-month faculty who are willing to take time from their summer to perform it, just as faculty who teach summer school are paid, and faculty who engage in scholarship over the summer may receive a research stipend. The *DePaul* OCR opinion, discussed *supra* at notes 285–300 and accompanying text, illustrates the consequences when such decisions are made in a way which appeared to OCR to be less than careful and thorough.

392. See *Marlon*, 2003 WL 22914304 (addressing a case where disability services office evaluation attached to student's petition, but office is not otherwise involved, opinion expresses no concern about this and grants summary judgment for the school); *Anderson v. Univ. of Wis.*,

policy or practice which requires all petitioning dismissed students' disability information to go to a university disability services office, with a summary report of that information prepared by that office for the committee and not the underlying disability information, may be a form of disability discrimination. Specifically, such a policy would preclude students from using unfiltered information to make a strong, documented case for readmission, a criterion which OCR has indicated is a legitimate factor in making readmissions decisions.³⁹³ On the other hand, in the event a student wishes to use the services of the university disability office in connection with her petition, she should be allowed to do so. Moreover, to the extent a law school committee is unclear about any disability information provided, or, as in *DePaul*,³⁹⁴ there is any evidence that any committee member is engaging in stereotypical or otherwise discriminatory thinking, disability experts (such as university counsel, the university disability services office, and/or the evaluator as appropriate) could be brought in.

While the ADA's employee provisions require confidentiality for employee disability information,³⁹⁵ there are no corresponding provisions concerning student disability information under Section 504 or the ADA.³⁹⁶ As student records information, however, student disability information is subject to FERPA (Family Education Rights and Privacy Act, the federal student records statute).³⁹⁷ FERPA requires confidentiality of information contained in student records unless the student has given written consent for disclosure,³⁹⁸ or the disclosure is pursuant to one of FERPA's many exceptions.³⁹⁹ Most pertinent is FERPA's exception for internal sharing with school employees who have "legitimate educational interest" in the information,⁴⁰⁰ as defined in the school's student records policy. Under this exception, it is appropriate to share disability information with agents of the school, such as the committee making readmissions decisions/recommendations, and the full faculty if the readmission decision is its to make. Persons who have

841 F.2d 737 (7th Cir. 1988) (dealing with a student's counselor's report that apparently went directly to committee without involvement of disability services office, and which says that student can now handle stress of law school; committee does not agree, opinion expresses no concern about this and grants summary judgment for the school).

393. See *supra* notes 265–266 and accompanying text.

394. See *supra* notes 285–300 and accompanying text.

395. See 42 U.S.C. §§ 12112(d)(3)(B); (d)(4); 29 C.F.R. § 1630.14; EEOC Enforcement Guidelines on Pre-Employment Inquiries Under the Americans with Disabilities Act, 8 FEP Manual 405:7191, 7201–02 (BNA 1995) (requiring employers to keep ADA-covered employees' medical information in a confidential file separate from the employee's personnel file).

396. Section 504 regulations do require that under the limited circumstances in which it is permissible for schools to make pre-admissions inquiries about applicants' disabilities, such information be kept confidential. 34 C.F.R. § 104.41(c)(2).

397. 20 U.S.C. § 1232g. For more detailed discussions of FERPA, see Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. (WEST) 469 (2001); Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. L. REV. 617 (1997).

398. 20 U.S.C. § 1232g(b) (2000 & Supp. II 2003).

399. *Id.*

400. 20 U.S.C. § 1232g(b)(1)(A) (2000 & Supp. II 2003).

such information must keep it confidential; disclosure beyond that permitted by FERPA may be treated as a form of disability discrimination.⁴⁰¹

5. Defer, and refuse to defer, as appropriate: university administrators and law faculty should defer when appropriate, but the law faculty should not defer, internally or externally, on academic issues

The law school must also determine which issues and decisions regarding the readmission petition are 1) academic, such as whether a student is likely to be successful if readmitted and whether a requested accommodation would alter the law school's academic standards, and, thus, ones in which it has expertise and the responsibility for making the ultimate judgment, 2) concern the existence and nature of an impairment, for which a disability expert has expertise and should make the ultimate judgment, or 3) legal, such as whether an impairment is a substantially-limiting-with-mitigators statutory disability.

In the illustrative scenario, Evaluator recommends and Student requests accommodations consisting of tutoring, note taking assistance, elimination of the writing requirement and extra time on exams. Their recommendation by Evaluator does not necessarily mean these adjustments are legally required reasonable accommodations. At many law schools, the college or university disability office makes recommendations for reasonable accommodations, while the law school retains the final decision, primarily so that it can determine whether any proposed accommodations would alter the law school's academic standards or present an undue hardship. Here, assuming Student is a statutorily covered person with the disability of dyslexia/reading disorder, there are two proposed accommodations, note-taking and extra time on exams, which are common for dyslexic/reading disordered students and should be familiar and noncontroversial to the committee. As to the recommendation for tutoring, the statutes provide that personal services are not required, although to the extent a school makes tutoring available to students without disabilities (as this school apparently does through its academic resource program for 1Ls) it must make such tutoring available to students with disabilities on a nondiscriminatory basis.⁴⁰² Finally, as to the elimination of the writing requirement, the decision as to whether this amounts to a change in academic standards is an academic one about which the law school, not Evaluator or the college or university disability office, has expertise and ultimate responsibility.⁴⁰³

Not deferring to internal or external disability experts on academic issues is expected by the courts,⁴⁰⁴ and is important for making good decisions on the merits and for preserving court and/or OCR deferral if those decisions are challenged. Consider, for example, a law school committee which defers to the opinion of its

401. *Cf. Bruschini v. Bd. of Educ.*, 911 F. Supp. 104, 106 (S.D.N.Y. 1995) (asserting disclosure of disability-related records as an IDEA violation).

402. *See supra* note 61 and accompanying text.

403. Of course, even if not a legally required reasonable accommodation, the law school may decide to waive it or offer an alternative adjustment.

404. *See Marlon*, 2003 WL 22914304.

disability services office, or that of Student's Evaluator, that a newly diagnosed Student's grades would be substantially higher if she were allowed extra time on exams, when the committee really thinks that Student had not grasped legal analysis (in which event the extra time will not improve Student's exam performance). This committee's actions suggest that the decision is not such an academic one. Consequently, a court has little reason to defer to that judgment. Conversely, college or university administrators hearing internal appeals of readmissions decisions or internal disability discrimination complaints should also defer to the law faculty's academic judgments. Second guessing by college or university administrators of the law faculty's decisions on academic issues invites courts and the OCR to do so as well, intrudes upon the expertise of the law faculty, and violates accreditation standards.⁴⁰⁵

6. Apply the readmission standard in a nondiscriminatory way

The school need not make the "correct" decision, with the aid of hindsight, on a petition, but it must apply its readmission process and standards in a nondiscriminatory way. This obligation runs from the mundane (e.g. applying a deadline for documentation equally to disability and other information) to the complex (e.g. predicting a petitioning student's future success). A school decision on the more complex end of the spectrum is whether to apply its readmission standard strictly or leniently. For example, if a school's policy or practice is to be lenient about the "extraordinariness" of circumstances required if a student's GPA is very close to the required minimum, the school must be equally lenient about extraordinariness when a student with a disability's GPA is very close to the required minimum. It would be helpful for law schools to collect and periodically review the readmission decisions of all students over a several-year period to ensure that standards are being applied nondiscriminatorily, and as the OCR is likely to do if it investigates a complaint.

a. *Nondiscriminatory consideration of disability as an extraordinary circumstance*

Applying the readmission standard to Student's petition in the illustrative scenario, and assuming *arguendo* that Student has a statutory disability, the committee must first determine whether Student's failure was caused by "extraordinary circumstances." The committee's determination of the cause of academic failure is an academic judgment for which the law school has expertise and responsibility. Student's asserted disability may be, but is not automatically, an extraordinary circumstance. In fact, the impairment could be an extraordinary circumstance even if it does not amount to a statutory disability.⁴⁰⁶ In the illustrative scenario, there is conflicting evidence on this issue, both about causation and about whether Student had a reasonable opportunity to obtain

405. See *supra* Section VII.A.2.

406. In such a case, however, disability discrimination claims would not be available to the student for review of the school's readmission decision.

administrative relief prior to dismissal. As to the cause of failure, there are Evaluator's and Student's claims that an undiagnosed and unaccommodated disability is the cause. On the other hand, there is a suggestion that an unwise decision to spend inordinate time on extracurricular activities is a problem. Even more significantly, there is evidence (the "very low" LSAT score) that Student was not one for whom legal analysis would come easily, and that Student's failure to master legal analysis and some of the basic concepts (based on instructor feedback) was the cause of the failure. As to whether there was a reasonable opportunity to obtain administrative relief, the committee might reasonably conclude that Student has the legal obligation to self-identify and document a disability, and then to request accommodations. The committee might reasonably conclude that Student should have pursued disability documentation and accommodations after receiving her poor fall grades, in concert with her actual understanding that she likely has a reading disability and could be tested for it. On the other hand, the committee might reasonably conclude that a person similarly situated to Student who has always done well without accommodations is reasonable in thinking she can "tough it out" successfully. In any event, the committee must apply the extraordinary circumstances standard (with the tort-like multiple causes and reasonable person analysis as illustrated by the scenario) in the same way to Student's case as it does to other cases not asserting a disability, or at least no more harshly than it does to other cases. For example, if another student asserts her failure was caused by a nasty divorce during her first year, the committee must do an *are-the-circumstances-extraordinary/causation/reasonable-person* analysis, with the same degree of strictness to that case.⁴⁰⁷

b. *Nondiscriminatory consideration of disability and prediction of future success if readmitted*

Whether the student would be academically successful if readmitted is the ultimate academic judgment for which the law school has the expertise and responsibility. In the illustrative scenario, as discussed above, there is conflicting evidence as to the cause of the failure and thus conflicting evidence about Student's ability to succeed in the future. The law school faculty provided legal instruction to Student for a year; no one else has done so. The law school faculty collectively have decades, if not centuries, of observing law students go on to succeed or fail in law school, on the bar exam, and in practice. The law school faculty know that some students, while bright, are just not intellectually suited to do legal analysis.

In the scenario, Evaluator has opined that Student will succeed if provided with the requested accommodations. While not disputing Evaluator's good intentions, she has neither the information (she is likely not privy to Student's LSAT score, nor the instructor and tutor feedback) nor the expertise (she has not attended law

407. One approach the committee may want to consider is to assume without deciding that the newly diagnosed disability is an extraordinary circumstance, or alternatively to make no finding on this issue, and move on to the future success criterion.

school, taught law school, taken a bar exam, or practiced law) to form an opinion about likely academic success to which the law school must or should defer. Nor, in fact, do the college or university disability services office or administrators, such as provosts, have the expertise to helpfully opine on this ultimate academic judgment call. The committee must consider all of the disability information provided by the student, including Evaluator's prediction of future academic success. The actual judgment, however, in all its subjectivity and complexity, should—and must—be made by the committee. This is necessary, not only to make the best decision possible, but, somewhat ironically, to preserve the possibility of judicial deference to the decision down the road. As previously discussed, if a law school defers to the judgment of another on this issue, it risks a court later seeing the issue as not such an academic one, and thus, not deferring to the school's decision.

In predicting success, the committee should do its best to factor in legally required reasonable accommodations if the student is a person with a statutory disability. Specifically, the committee should try to predict how Student in the illustrative scenario would perform if provided with reasonable accommodations (in the scenario, likely note-taking and extra time on tests).⁴⁰⁸ In some cases where the student has received accommodations such as extra time on tests and has still not earned the minimum required grades, making this prediction is fairly straightforward. In the illustrative scenario, there is no data on Student's performance with accommodations, and the committee simply must do its best to make a prediction. The committee may, for example, find it helpful to see if Student performed better on law school assignments, such as take home exams and legal writing papers, which do not have time limits. If she did not fare better, it suggests that something besides reading and writing under time limits (perhaps the problems with analysis and concept mastery identified by the instructors) is the primary cause of the student's failure, and additional time on exams is not likely to significantly improve performance. The scenario is further complicated by the fact that some of the requested accommodations may not be reasonable, as discussed above.⁴⁰⁹ On this last issue, one approach the committee may want to consider is to explicitly assume, without deciding, that the requested accommodations are reasonable, and predict success with all the requested accommodations.

In the illustrative scenario, there is conflicting evidence on Student's ability to succeed. On the one hand, the evaluation may suggest that Student's exam performance underestimates her mastery of the curriculum, and the "very low" LSAT without accommodations might cause the faculty to underestimate Student's potential. On the other hand, the LSAT score suggests Student's native legal reasoning ability may be limited, and feedback from Student's instructors suggests the problem is with legal reasoning rather than reading, which will not be cured with additional exam time. Student's extremely active role in extracurricular

408. Note that in the scenario, Student was already taking a reduced load, which is a common accommodation for students with dyslexia because they need more time to complete the assigned reading for each class.

409. See *supra* note 61 and accompanying text.

activities and failure to attend tutoring sessions suggests other possible causes of her failure. Student's history of academic success, including a B average in a subject area requiring much reading, suggests her reading abilities may not be severely limited. Student's suggestion in her petition that she needs tutoring and a waiver of the writing requirement to succeed might be taken to suggest that she is not otherwise qualified for readmission if those adjustments are determined to be part of the school's fundamental academic standards. The committee could reasonably decide either way; it must and can only do what it thinks is the "right thing," and can expect a court to defer to its decision if it follows the above-described guidelines.

VIII. CONCLUSION

It is an honor for college and university administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference. Like all honors, it comes with a responsibility—a challenge to all those working in higher education: use your educational judgment carefully, deliberately, and often. If we continue to do so, we will earn judicial deference to our efforts and continue to create vibrant, living, learning environments for our students, faculty, and staff.⁴¹⁰

While this statement pertains to higher education academic decisions generally, it applies with equal force to the specific category of deciding whether to readmit academically dismissed students who claim a disability. The confluence of strict standards for defining who has a statutory disability, and the courts' largely deferential approach to disability discrimination claims by academically dismissed students, means that schools can normally make readmissions decisions about students with disabilities without worrying about being reversed in court. Law schools thus currently have the freedom to do the right thing, as their educational judgment defines it: to "use [their] educational judgment carefully, deliberately, and often" when making readmissions decisions, including denying readmission to students with disabilities, nondiscriminatorily and in good faith. The court cases suggest that the courts believe law schools have been meeting this standard, and they must endeavor to continue to do so, or risk the judicial deference law schools currently enjoy.

410. Stoner & Showalter, *supra* note 107, at 617.

“IS SOMEONE RIDING AROUND A GOLF
COURSE FROM SHOT TO SHOT *REALLY* A
GOLFER?”[†]

THE SUPREME COURT DETERMINES THE
ESSENCE OF THE GAME OF GOLF—AND WHAT
THE DECISION COULD MEAN FOR LEARNING
DISABLED STUDENTS IN HIGHER EDUCATION

SUZANNE WILHELM, LL.M., J.D.*

I. INTRODUCTION

Casey Martin is a talented golfer who suffers from a debilitating degenerative circulatory disease known as Klippel-Trenaunay-Weber Syndrome.¹ This disease restricts the flow of blood from Martin’s leg to his heart, causing great pain, fatigue, and anxiety.² To play golf during college, Martin requested and was granted waivers by the National College Athletic Association (NCAA) of its rules requiring golfers to walk the course and carry their own golf clubs.³ When Martin turned professional, he sought to qualify for a Professional Golf Association (PGA) tournament, which requires successful completion of a three-stage qualifying event known as the “Q-School.”⁴ Martin entered the Q-School and successfully completed the first two stages, in which use of a golf cart is permitted.⁵ During the third stage of the Q-School, however, the PGA rules do not permit use of a cart. Martin, therefore, requested a waiver of the “no cart” rule as

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[†] PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

1. *Id.* at 667–68.
2. *Id.* at 668.
3. *Id.*
4. *Id.* at 669.
5. *Id.*

an accommodation for his disease.⁶ The PGA refused the waiver and Martin sued alleging, *inter alia*, discrimination in violation of Title III of the Americans With Disabilities Act (ADA).⁷

Even though disability claimants rarely win,⁸ Martin won his lawsuit. Over the PGA's contentions to the contrary, the Supreme Court held that a waiver of the "no cart" rule would not fundamentally alter PGA tournaments.⁹ Casey Martin's case does not involve an institution of higher learning, but it does involve a professional association's decision that one of its rules is essential and cannot be waived without fundamentally altering its tournaments. The Court's willingness to substitute its opinion for that of the institution may prove troublesome for colleges and universities in determining whether to accommodate learning disabled students on their campuses.

Accommodating learning disabled students in higher education provokes controversy nationwide. Proponents of federal disability laws consider accommodations for learning disabled students necessary to provide access to higher learning and eliminate stigma against disabled students, aiming to establish a level playing field in which no student has an unfair advantage.¹⁰ Opponents contend that accommodations in the form of extra time on exams, distraction free environments for testing, and course waivers, unlike books in Braille, would aid all students and therefore, give disabled students an unfair competitive advantage and ultimately result in lowering the educational bar.¹¹ But as colleges and universities strive to accommodate disabled individuals on their campuses, very few cases ever reach the courts. And when they do, students—like most disability claimants—rarely win.

Statistics show that 92.11% of disability cases brought by employees are decided in favor of the defendant.¹² Similarly, a study by the editors of the

6. *Id.*

7. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998).

8. *See infra* Parts II–VII.

9. *PGA Tour, Inc. v. Martin*, 532 U.S. at 683.

10. *See, e.g.*, Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans With Disabilities Act*, 111 HARV. L. REV. 1560 (1998). *See also*, Preface to ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA): A NO-NONSENSE GUIDE FOR CLINICIANS, EDUCATORS, ADMINISTRATORS AND LAWYERS 1–18 (Michael Gordon & Shelby Keiser eds., 1998) [hereinafter ACCOMMODATIONS] (setting forth the arguments in favor of—and against—the ADA).

11. For a thorough treatment of this issue, see MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE, AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997); Robert J. Sternberg & Elena L. Grigorenko, *Which Queue?*, 97 MICH. L. REV. 1928 (1999) (reviewing MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE, AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997)) (arguing that, in theory, protection for students with learning disabilities is justifiable, but that in practice, the law falls short of having the desired affect).

12. Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans With Disabilities Act*, 41 AM. BUS. L.J. 145, 174 (2003) (citing the Commission on Mental & Physical Disability Law, American Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998)).

National Disability Law Reporter found that in 110 disability cases, the question was raised as to whether the plaintiff met the definition of “disabled.”¹³ Of those cases, only six found in favor of the plaintiff.¹⁴ This means that in 94.5% of the disability cases examined, plaintiffs lost because they were unable to establish that they were disabled within the meaning of federal disability laws. A review of the cases involving disabled students claiming mental impairments such as dyslexia, dysgraphia, dyscalculia, ADD, and ADHD reveal that these plaintiffs also lose at an alarming rate.¹⁵

Nevertheless, the courts continue to narrow the definition of “disabled” under federal disability laws, making it even more difficult to establish the threshold requirement of being disabled.¹⁶ If a disabled student gets over this hurdle, however, he or she is entitled to accommodations so long as they are necessary, reasonable, and do not fundamentally alter academic programs.¹⁷ The courts have traditionally given great deference to decisions by institutions of higher education refusing accommodations on the premise that it fundamentally alters academic programs.¹⁸ Deference at this point in the litigation will mean that even though the student is disabled, and even though the accommodations are assumed to be necessary for the disabled student’s successful completion of the program in question, they will not be required by the court in which the lawsuit was brought. The *Martin* decision could have an impact on how courts decide this issue.

Following a review of recent decisions in federal disability law as it affects higher education, this article examines the *Martin* decision and the impact that it could have on higher education.

II. AN OVERVIEW OF THE ADA

In 1990, Congress passed the Americans With Disabilities Act extending disability protection to private employers and places of public accommodation, whether or not they receive federal financial assistance.¹⁹ Prior to the enactment of the ADA, disabled individuals relied on the Rehabilitation Act of 1973, often cited as Section 504, which prohibits discrimination by programs that receive federal

13. Denbo, *supra* note 12, at 173–74 (citing Thomas D’Agostino, National Disability Law Reporter, Defining “Disability” under the ADA: 1997 Update ii (1997)).

14. Denbo, *supra* note 12, at 173–74.

15. For an interesting example, see *Price v. Nat’l Bd. of Medical Exam’rs*, 966 F. Supp. 419 (S.D. W. Va. 1997).

16. See generally *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002) (narrowing the definition of what constitutes a major life activity under the ADA by holding that only activities of central importance to daily life are major life activities and that the “class of activities” concept is reserved for work). For a thorough discussion of this case, see *infra* Part V.

17. See *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

18. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 300 (1985); *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); *Maczaczaj v. N.Y.*, 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

19. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

financial assistance.²⁰ Today, cases may be filed under one, or both of these statutes, and because of the symmetry of the two laws, courts will use cases decided under either interchangeably.²¹ For this reason, when references are made to the ADA henceforth in this paper, the discussion may be taken to apply equally to Section 504 of the Rehabilitation Act of 1973, unless otherwise noted. Title II of the ADA applies to public entities. It provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.²²

A public entity is defined as “(A) any State or local government; [and/or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government...”²³

Similarly, Title III, which applies to places of public accommodation, provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.²⁴

Title III provides a list of private entities that are considered to be public accommodations under the ADA, such as inns, hotels, restaurants, theaters, convention centers, bakeries, shopping centers, banks, barbers, museums, etc.²⁵ Section 12181(7)(J), specifically includes: “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”²⁶

Thus, institutions of higher education organized under the auspices of either state or local government are public entities as defined in Title II of the ADA, or places of public accommodation, specifically included in Title III.²⁷ As a result, they are prohibited from discriminating against students with disabilities, which includes failing to provide necessary and reasonable accommodations to disabled students.²⁸ Before a disabled student is entitled to accommodations, however, he

20. 29 U.S.C. § 794(a) (2000).

21. *Fedorov v. Bd. of Regents for the Univ. of Ga.*, 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002). It should be noted that plaintiffs may also raise disability discrimination claims under any and all state laws that apply.

22. 42 U.S.C. § 12132 (2000).

23. 42 U.S.C. § 12131(1)(A)–(B) (2000).

24. 42 U.S.C. § 12182(a) (2000).

25. 42 U.S.C. § 12181 (2000).

26. 42 U.S.C. § 12181(7)(J) (2000).

27. *See Dubois v. Alderson-Broadus Coll., Inc.*, 950 F. Supp 754, 757 (N.D. W. Va. 1997). Also, the *Martin* decision includes an enlightening discussion as to what the ADA means by “public accommodation.” *See PGA Tour, Inc. v. Martin*, 532 U.S. at 674–81.

28. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). For the text of the statutory provision, see *infra* Part VII.

or she must meet the threshold requirement of being disabled within the meaning of the ADA. If a court finds that a student is not disabled under the ADA, the lawsuit will be dismissed and the court will never reach the substantive issues in the case.

III. WHAT IT MEANS TO BE DISABLED FOR PURPOSES OF THE ADA

With respect to an individual, the ADA defines disability as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.²⁹

An individual claiming entitlement to accommodations due to disability might theoretically meet the requirements of any one of these three criteria. Claiming under (A), a student would allege that he/she “has” a disability. The *Martin* decision is an example of this type of claim. Casey Martin actually has a degenerative circulatory disease known as Klippel-Trenaunay-Weber Syndrome, which qualifies as a physical impairment.³⁰ Under (B), a student would allege that someone “says” he/she has a disability. In one very famous case, the claimant suffered from tuberculosis for which she was hospitalized.³¹ The Supreme Court held that her hospitalization established that she had a “record of... impairment” within the meaning of the law.³² Finally, under (C), a student may claim that someone “thinks” he/she has a disability. Examples could include students affected with the HIV virus that are asymptomatic. In *Cook v. Rhode Island Department of Mental Health, Retardation and Hospitals*, a morbidly obese woman who was rejected for employment as an institutional assistant because of her obesity alleged discrimination on the basis of a perceived disability.³³ The institution had not tested Cook to determine if she could perform the job requirements.³⁴ The court held for Cook, stating: “Section 504’s perceived disability model can be satisfied whether or not a person actually has a physical or mental impairment.”³⁵ Thus, students can be perceived as disabled, even when they are, in fact, not disabled.

Generally, however, students seek to establish that they have a physical or mental impairment that substantially limits a major life activity. This definition involves the analysis of three basic issues: (1) whether the individual has a physical or mental impairment; (2) whether the impairment limits a major life

29. 42 U.S.C. § 12102(2) (2000).

30. *Martin v. PGA Tour, Inc.*, 994 F. Supp. at 1244.

31. *Sch. Bd. of Nassau County, Fl. v. Arline*, 480 U.S. 273 (1987).

32. *Id.* at 286.

33. *Cook v. R.I. Dept. of Mental Health, Retardation & Hosp.*, 10 F.3d 17, 20–21 (1st Cir. 1993).

34. *Id.* at 27.

35. *Id.* at 22.

activity; and (3) whether the limitation is substantial. In the following pages of this article, cases and factual scenarios are included to give the reader a thorough, practical understanding of these issues.

IV. WHEN DOES AN INDIVIDUAL HAVE A PHYSICAL OR MENTAL IMPAIRMENT?

The ADA does not define "physical or mental impairment," "major life activity," or "substantially limits." As a result, courts turn to regulations promulgated by the agencies that have been granted authority to interpret the ADA and to relevant case law when they adjudicate ADA claims.³⁶ Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define the phrase physical or mental impairment as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.³⁷

Examples of mental illnesses include bipolar disorder, major depression, anxiety disorders such as panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder, schizophrenia, and personality disorders.³⁸ Mental impairment under the ADA does not encompass common personality traits such as, irritability, poor judgment, or irresponsible behavior.³⁹

Pazer v. New York State Board of Law Examiners is instructive as to what is considered an "impairment" under the ADA.⁴⁰ Pazer claimed to have a learning disability from impaired visual processing.⁴¹ As a reasonable accommodation, he requested to take the New York Bar Examination over a period of four days instead of two, using a computer with word processing, spell-check, and

36. Authority to promulgate regulations under the ADA was divided among three agencies: The Equal Employment Opportunity Commission (EEOC) has authority to regulate under Title I, 42 U.S.C. § 12116; the Attorney General regulates under Title II, 42 U.S.C. § 12134; and the Secretary of Transportation regulates transportation provisions under Title III, 42 U.S.C. § 12186(a)(1). The U.S. Attorney General regulates the remaining provisions, 42 U.S.C. § 12186(b). Some years ago, the Supreme Court noted that no agency has been given authority to regulate under the generally applicable provisions of the ADA, which include the definition of "disability." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999). In *Sutton*, the Court quoted extensively from the regulations, but declined to decide what deference courts should give to agency regulations interpreting these provisions. The lower courts have been divided as to the binding nature of agency regulations.

37. 29 C.F.R. § 1630.2(h) (2005).

38. SECTION 504 COMPLIANCE HANDBOOK, LAWS, REGULATIONS & ORDERS, App. III, 621 (1997). The list is not meant to be exhaustive, only exemplary.

39. See *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989).

40. 849 F. Supp. 284 (S.D.N.Y. 1994).

41. *Id.* at 285.

abbreviation expanding software, with permission to record his answers in the test booklet, and in a distraction-free environment.⁴² These accommodations were denied and Pazer sued.⁴³ In concluding that Pazer did not have an impairment for purposes of the ADA, the court stated: “The [c]ourt... finds some merit to the argument that a disparity between inherent capacity and performance on a test may, in some circumstances, permit the inference that an individual has a learning disability, even though that individual’s performance has met the standard of the ordinary person.”⁴⁴

However, in Pazer’s case, the court was convinced that he did not have an eye-motor coordination problem, because he had scored well within the adult average range on the Woodcock-Johnson-Spatial Relations and other achievement tests—if he had a problem, the court believed that it would have been revealed in these tests.⁴⁵ Moreover, Pazer had not received accommodations in high school or during his first two years in college.⁴⁶ The court was persuaded by expert testimony in the case that the disparity between Pazer’s test performance and inherent capacity could have been the result of stress or nervousness, and was therefore, not due to a learning disability. Thus, the court held that Pazer did not have a disability within the meaning of the ADA, noting: “Indeed, to hold otherwise would compel the conclusion that any underachiever would by definition be learning disabled as a matter of law....”⁴⁷

There are also issues concerning who is the appropriate professional to document impairment.⁴⁸ Establishing that one actually has an impairment is generally the easy part for most disability claimants. Having an impairment, however, is not sufficient. Under the ADA, the impairment must affect a major life activity.

V. WHAT IS A “MAJOR LIFE ACTIVITY” UNDER THE ADA?

Major life activities are defined in the regulations as “those basic activities that the average person in the general population can perform with little or no difficulty.”⁴⁹ Major life activities include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁵⁰ This relatively short list has been expanded by the courts to include

42. *Id.* at 285–86.

43. *Id.* at 285.

44. *Id.* at 287.

45. *Id.*

46. *Id.*

47. *Id.*

48. For a thorough analysis of mental impairments, including a discussion of what documentation is needed to establish that an individual suffers from a mental impairment, see generally James G. Frierson, *Legal Requirements for Clinical Evaluations*, in ACCOMMODATIONS, *supra* note 10, at 47.

49. 29 C.F.R. pt. 1630, App. § 1630.2(I) (2005).

50. 28 C.F.R. § 35.104(l)(iii)(2) (2005).

sleeping, engaging in sexual relations and interacting with others⁵¹; reproduction⁵²; eating, drinking and learning⁵³; thinking⁵⁴; and reading.⁵⁵

Recently, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court made its first pronouncement on what constitutes a “major life activity” under the federal disability laws.⁵⁶ There, the plaintiff, Williams, claimed to be disabled because of carpal tunnel syndrome.⁵⁷ She claimed that the major life activities affected by her impairment were: manual tasks, housework, gardening, playing with her children, lifting, and working.⁵⁸ The trial court held that she was impaired, and that manual tasks, lifting, and working are major life activities within the meaning of the ADA, but that her impairment was not substantially limiting because she could perform her job tasks in assembly and paint inspection at the plant.⁵⁹ On appeal, the court held that the plaintiff proved that she was disabled by establishing that her manual disability involved a “class” of manual tasks affecting her ability to work.⁶⁰ The Supreme Court reversed. In its first opinion to address the meaning of major life activity under the federal disability laws, the Court rejected the notion that a “class” of manual tasks affecting the plaintiff’s ability to work could establish a major life activity.⁶¹ The “class” analysis is reserved for cases in which the major life activity affected is working, the Court said.⁶² Citing Webster’s Dictionary, the Court stated that “major” means important, and thus the phrase “major life activities” refers to “those activities that are of central importance to daily life.”⁶³

Toyota Manufacturing narrows the meaning of major life activity, and will provide an obstacle for disability claimants seeking to widen the range of activities that implicate the ADA. Though courts may still add to the list of activities under

51. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999). *But see* *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (rejecting plaintiff’s claim that his mental illness substantially limited his ability to get along with others, and stating that while the ability to get along with others is a “skill to be prized,” it is “different in kind from breathing or walking” and thus not a major life activity under the ADA).

52. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

53. *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999), *reh’g denied*, No. 98-2894 EMSL, 1999 U.S. App. LEXIS 22998 (8th Cir. Sept. 21, 1999).

54. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999).

55. *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93 Civ. 4986 (SS), 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).

56. *Toyota*, 534 U.S. 184.

57. *Id.* at 187.

58. *Id.* at 190.

59. *Id.* at 191. The trial court rejected the plaintiff’s claims that housework, gardening, and playing with her children are major life activities cognizable under the ADA.

60. *Id.* at 192.

61. *Id.* at 200.

62. *Id.* (quoting EEOC regulations, 29 CFR § 1630.2(j)(3) (2001): “With respect to the major life activity of *working* [,] [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”).

63. *Id.* at 197.

the federal disability laws, they must be vigilant to include only activities that are of central importance to daily life. Perhaps more significantly, any extension of the “class” analysis is henceforth effectively proscribed.

VI. WHEN IS A MAJOR LIFE ACTIVITY SUBSTANTIALLY LIMITED BY AN INDIVIDUAL’S IMPAIRMENT?

The EEOC regulations define “substantially limits” as:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.⁶⁴

The regulations thus contemplate comparing the residual abilities of an impaired person to the abilities of an average person in the general population. The EEOC gives the following example in its interpretive guidance to the regulations:

[A]n individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below average speed.⁶⁵

Factors that should be considered in determining whether an impairment is substantially limiting include:

- i. The nature and severity of the impairment;
- ii. The duration or expected duration of the impairment; and
- iii. The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.⁶⁶

In *Price v. National Board of Medical Examiners*, the court employed the EEOC’s “average person in the general population” formula and concluded that three medical students were not disabled for purposes of the ADA.⁶⁷ All three students had been diagnosed with ADHD, and two of the students had been further diagnosed with learning disorders.⁶⁸ They requested, but were denied, accommodations in the form of additional time and separate rooms for the United States Medical Licensing Examination (USMLE).⁶⁹ The court noted that the

64. 29 C.F.R. § 1630.2(j)(1) (2005).

65. 29 C.F.R. pt. 1630, App. § 1630.2(j) (2005).

66. 29 C.F.R. § 1630.2(j)(2) (2005).

67. *Price*, 966 F. Supp. at 422.

68. *Id.*

69. *Id.*

students were clearly impaired, but held that they were not substantially limited in the major life activity of learning, because they were able to learn as well as, or better than, the average person in the general population.⁷⁰ The court utilized an example involving two hypothetical students:

Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.⁷¹

The court found that the plaintiffs in this case best compared to Student B.⁷² Plaintiff Price had graduated from high school with a 3.4 grade point average, and from Furman University with a 2.9 grade point average—all without accommodations.⁷³ He did receive accommodations on the MCAT, and was admitted to medical school.⁷⁴ Morris was a national honor student in high school, graduated from Virginia Military Institute with average grades, maintained a 3.4 grade point average at Sheperd College, and was admitted to medical school—all without accommodations.⁷⁵ Plaintiff Singleton was designated gifted from second grade through high school, graduated high school with a 4.2 grade point average, was admitted into the United States Naval Academy, graduated from Vanderbilt University, and was admitted to medical school—all without accommodations.⁷⁶ This history reflected superior scholastic achievement with no evidence of substantial limitation on learning ability. Thus, the court held that while these students were impaired, they were not substantially limited in the major life activity of learning when compared to the average person in the general population.⁷⁷

70. *Id.* at 427–28.

71. *Id.* at 427.

72. *Id.*

73. *Id.* at 423.

74. *Id.*

75. *Id.* at 424.

76. *Id.* at 423.

77. *Id.* at 427–28. *See also* *Gonzalez v. Nat'l Bd. of Medical Exam'rs*, 60 F. Supp. 2d 703 (E.D. Mich. 1999) (quoting S. REP. NO. 101-116 (1989)). Plaintiff's doctor, a psychologist in the Neuropsychology Division of the University of Michigan Hospitals, testified that he "compared plaintiff's performance to fourth year college students and found that some of his scores were below average to impaired." *Id.* at 707. Noting that the ADA does not define "substantially limits," the court turned to legislative history. *Id.* at 707–08. According to the report of the Senate Committee which developed the ADA structure, an impairment must restrict a person's

In *Sutton v. United Air Lines, Inc.*, the Supreme Court added to the difficulties faced by disability claimants trying to establish that they are substantially limited in a major life activity under the ADA.⁷⁸ *Sutton* involved twin sisters with severe myopia, an abnormal eye condition commonly known as near-sightedness.⁷⁹ They applied for jobs as commercial pilots but were rejected because of an airline rule requiring uncorrected vision of at least 20/100.⁸⁰ The twins had 20/20 vision with corrective lenses, but uncorrected, their vision was only 20/200.⁸¹ The twins sought a waiver of the airline rule requiring uncorrected vision of 20/100.⁸² The Supreme Court found that myopia qualified as impairment under the ADA, and that the impairment affected the major life activity of seeing.⁸³ The Court determined, however, that because corrective lenses mitigated the effects of the functional impairment, the twins were not substantially limited by their myopia.⁸⁴ Consequently, the twins did not meet the threshold requirement of being disabled under the ADA, and were not entitled to accommodations.⁸⁵

The *Sutton* Court found that Congress intended that disability be determined using a functional approach, with the term “substantially limits” to mean currently limiting, not potentially, or hypothetically, limiting.⁸⁶ As a result, impairments that can be controlled or corrected by mitigating measures such as eyeglasses or medications may not substantially limit a major life activity.

Two fairly recent cases involving a mental impairment deserve mention here. In the first of these cases, Swanson, a young man suffering from major depression, brought suit after his surgical residency at the University of Cincinnati was terminated.⁸⁷ Shortly before being terminated, he sought professional help and was placed on Paxil and later Prozac, both of which are anti-depressants.⁸⁸ The trial court held that major depression is an impairment, and that the ability to concentrate and sleep are major life activities.⁸⁹ Nevertheless, the court reasoned that since Swanson was taking anti-depressant medications to control his depression, and it was undisputed that the medications had improved his sleep and ability to concentrate, his limitation was only temporary at best, and therefore, not

major life activity as to the “conditions, manner, or duration under which [the activity] can be performed in comparison to *most people*.” *Id.* at 707. The court concluded that it was error to compare plaintiff’s performance to other college students and found that, when compared with “most people,” the plaintiff was not disabled because he was superior to the average person in the general population. *Id.* 708–09.

78. *Sutton*, 527 U.S. 471.

79. *Id.* at 475.

80. *Id.* at 476.

81. *Id.* at 475.

82. *Id.* at 476.

83. *Id.* at 490.

84. *Id.* at 488.

85. *Id.* at 491.

86. *Id.*

87. *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001).

88. *Id.* at 311.

89. *Id.* at 314.

substantial.⁹⁰ As evidence of improvement, the district court noted that since Swanson was terminated, he had begun a new preliminary residency at the University of Nevada (UN) and was given a “solid performance” rating.⁹¹

On appeal, Swanson argued that the district court erred in considering his performance at UN as evidence of improvement.⁹² According to Swanson, the court was required to determine whether he was substantially limited at the time of his termination and that, at that time, his medication had not had time to reach its optimal effect.⁹³ Quoting the factors for determining whether an impairment is substantially limiting as set forth in the regulations,⁹⁴ the court of appeals held that the district court was correct in looking forward in time to his later performance at UN, because it showed that his impairment was short term in duration and mitigated by medication.⁹⁵ The court affirmed the district court’s conclusion that Swanson was no more limited by his depression than the average person, and was therefore not substantially limited.⁹⁶ Quoting from *Sutton*, the appeals court stated: “The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.”⁹⁷

In the second case, the Tenth Circuit considered a claim by a medical student that he was disabled because of an anxiety disorder that manifested itself when he took chemistry and mathematics tests.⁹⁸ Although the anxiety disorder qualified as an impairment under the ADA, the court determined that its manifestation in only two subjects did not amount to a limitation on a major life activity.⁹⁹ The court stated, however, that even if the plaintiff’s impairment limited a major life activity, that limitation would not be substantial.¹⁰⁰ The plaintiff had developed study habits that allowed him to overcome his difficulties, thus mitigating the effects of his anxiety disorder.¹⁰¹ Holding that the plaintiff was not disabled, the court stated, *in dicta*: “Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the

90. *Id.* at 315.

91. *Id.* at 312, 315.

92. *Id.* at 316.

93. *Id.*

94. See 29 C.F.R. § 1630.2(j)(2) (2005); *supra* p. 109.

95. *Swanson*, 268 F.3d at 317.

96. *Id.* at 316.

97. *Id.* (quoting *Sutton*, 527 U.S. at 488).

98. *McGuinness v. Univ. of N.M.*, 170 F.3d 974, 976 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999).

99. *Id.* at 978 (quoting 29 C.F.R. § 1630.2(j)(3)(1)). The court reasoned that limitations with respect to academic subjects is similar to limitations in working; to be disabled from working, an individual must be unable to perform “a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.” Following the decision in *Toyota*, the court’s reasoning may be flawed.

100. *Swanson*, 268 F.3d at 978.

101. *Id.*

effects of test anxiety.”¹⁰²

In demonstrating the difficulties facing a disability claimant, the cases and regulations provide insight into the reasons for the poor statistical outlook facing disability claimants. Keeping in mind that the purpose for establishing a disability under the ADA is to be entitled to accommodations, failing in this threshold determination spells dismissal, and hence, no entitlement to accommodations. The next part of this article focuses on accommodations for the rare claimant that overcomes the federal disability hurdle.

VII. ADA ACCOMMODATIONS FOR DISABLED STUDENTS MUST BE NECESSARY, REASONABLE, AND THEY MAY NOT FUNDAMENTALLY ALTER ACADEMIC PROGRAMS

Under the ADA, students with disabilities, as that term has been defined by the regulations and the courts, may be entitled to an accommodation of their academic program. According to Title III of the ADA, discrimination includes:

[A] failure to make *reasonable* modifications in policies, practices, or procedures, when such modifications are *necessary* to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations (emphasis added).¹⁰³

Thus, under the ADA, required accommodations for disabled students must be reasonable, necessary and they must not fundamentally alter the nature of the academic program.¹⁰⁴

In higher education, accommodations may include double time on exams, course waivers, distraction-free environments for taking exams, additional time for completing written assignments, impunity from spelling errors, alternative exam formats, note takers, and readers. Extra time on exams and distraction free rooms for test taking are generally considered reasonable.¹⁰⁵ Whether an accommodation is necessary turns on its effectiveness at ameliorating the effects of a student's functional limitations. The more tightly an accommodation is tailored to a student's functional limitations, the more likely it will be found to be necessary.¹⁰⁶

Greater difficulty for disability claimants in the context of higher education come from the ADA requirements that accommodations be reasonable and that

102. *Id.* at 979.

103. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

104. *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397.

105. *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998); *Axelrod v. Phillips Acad., Andover*, 36 F. Supp. 2d 46, 52 (D. Mass. 1999). Unlimited time, however, has been held to be an unreasonable accommodation for the reason that it is not in accord with real life situations. *See Panazides v. Va. Bd. of Educ.*, 804 F. Supp. 794, 803 (E.D. Va. 1992), *rev'd on other grounds*, 13 F.3d 823 (4th Cir. 1994).

106. Michael Gordon & Kevin Murphy, *Attention Deficit Hyperactivity Disorder*, in ACCOMMODATIONS, *supra* note 10, at 70.

they not fundamentally alter the nature of academic programs. It has long been accepted wisdom that a “university need not modify its programs in a manner that fundamentally alters their nature or constitutes an undue burden on it.”¹⁰⁷ The seminal case is *Southeastern Community College v. Davis*.¹⁰⁸

In *Davis*, Frances Davis, a licensed practical nurse with a serious hearing disability, sought to be trained as a registered nurse.¹⁰⁹ She was denied admission to Southeastern Community College’s nursing program after it was determined that she could not safely participate in the school’s normal clinical training program because of her disability, and that it would ultimately be unsafe for her to practice nursing.¹¹⁰ After she was notified that she was not qualified for nursing school, she sued Southeastern under Section 504 of the Rehabilitation Act of 1973,¹¹¹ alleging discrimination for failure to accommodate her functional limitations.¹¹² Requested accommodations included (1) close, individual supervision by faculty members when Davis would be directly attending patients; (2) waiver of specified required courses; and (3) limited training in some, but not all, duties of a registered nurse.¹¹³ Davis claimed that it would be sufficient if she were trained to perform “some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.”¹¹⁴

The district court rejected Davis’s claim.¹¹⁵ The court held that because of her disability, she was not “otherwise qualified” for the nursing program.¹¹⁶ On appeal, the Fourth Circuit reversed.¹¹⁷ The appeals court held that an individual’s impairment should not be taken into account for the purpose of determining whether the individual is “otherwise qualified” for the program.¹¹⁸ The Supreme Court rejected the Fourth Circuit’s reasoning, holding that “[a]n otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.”¹¹⁹

The Supreme Court then turned to consider whether the qualifications required by Southeastern for participation in its nursing program might not be necessary. If the requirements were found to be unnecessary, then Southeastern might be discriminating against a qualified, handicapped individual. Citing the relevant regulations,¹²⁰ the Court found that the accommodations that Davis requested

107. *Stern v. Univ. of Osteopathic Med. and Health Sci.*, 220 F.3d 906 (8th Cir. 2000).

108. 442 U.S. 397.

109. *Id.* at 400.

110. *Id.* at 401.

111. 29 U.S.C. § 794 (2000).

112. *Se. Cmty. Coll. v. Davis*, 442 U.S. at 402.

113. *Id.* at 407–08.

114. *Id.* There was evidence in the case that a number of positions would be available that Davis could satisfactorily perform even with her limited hearing, such as physician’s office work.

115. *Davis v. Se. Cmty. Coll.*, 424 F. Supp. 1341 (E.D.N.C. 1976).

116. *Id.* at 1345.

117. *Davis v. Se. Cmty. Coll.*, 574 F.2d 1158 (4th Cir. 1978).

118. *Id.* at 1161.

119. *Se. Cmty. Coll. v. Davis*, 442 U.S. at 406.

120. Under a § 504 claim, the following Health, Education & Welfare regulations would be

would fundamentally alter the nursing program. First, the sort of close, personal supervision of Davis that would be necessary to ensure patient safety was expressly rejected as a required accommodation by the regulations.¹²¹ Second, by waiving the clinical courses and allowing Davis to take only academic courses, she would not receive the normal training that Southeastern's program was designed to deliver.¹²² Finally, if Southeastern were required to train Davis in only some of the duties of a registered nurse, it would be required to abandon its academic purpose in nursing, which according to the uncontroverted testimony of Southeastern's staff and faculty "was to train persons who could serve the nursing profession in all customary ways."¹²³ The Court held: "Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires."¹²⁴

In conclusion, the Court stated:

One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no

relevant:

- (a) *Academic requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

...

- (d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

- (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

45 CFR § 84.44 (2005). It is important to note that the Rehabilitation Act of 1973, unlike Title III of the ADA, did not expressly set forth the fundamental alteration test. That test was formulated by the Supreme Court and later adopted in the language of Title III. Nevertheless, after Davis, whether a claim against an educational institution is brought under the ADA or the Rehabilitation Act of 1973, the fundamental alteration test applies.

121. Se. Cmty. Coll. v. Davis, 442 U.S. at 409.

122. *Id.* at 409–10.

123. *Id.* at 413.

124. *Id.* at 410.

violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.¹²⁵

Following *Davis*, the courts have indicated a willingness to defer to an educational institution's decision that reasonable accommodation is not available so long as the decision is based on reasoned, professional, academic judgment.¹²⁶ In *McGregor v. Louisiana State University Board of Supervisors*, the Law Center's refusal to allow a student to attend part-time and take exams at home was upheld by the court.¹²⁷ The Law Center had a policy requiring that all students carry a full-time course load.¹²⁸ The court made reference to an affidavit introduced by the Law Center establishing that the accommodations sought by McGregor had never been given to any student, and concluded that to require the Law Center to permit McGregor to attend part-time would force it to lower its academic standards or compromise a reasonable academic policy.¹²⁹ Noting that it "must accord reasonable deference to the Law Center's academic decisions," the court held that the requested accommodations would fundamentally alter the program.¹³⁰

In *Jacobsen v. Tillman*, the court found the plaintiff's request to be relieved of the requirement of passing the math portion of a teacher certification program to be an unreasonable accommodation for her dyscalculia.¹³¹ According to the Minnesota Board of Teaching, the purpose for requiring teachers to pass the math test was to ensure that teachers have adequate skills.¹³² The court found the requirement to be an essential aspect of the teacher certification program and concluded that waiving the test would fundamentally alter the nature of the certification program.¹³³

Deference was again given to a college's decision to refuse a plaintiff's request to attend a required residency program via telephone because of his severe panic

125. *Id.* at 414. *Accord Alexander*, 469 U.S. at 300-01.

126. *Guckenberger v. Boston Univ. (Guckenberger II)*, 974 F. Supp. 106 (D. Mass. 1997). *See also Wynne v. Tufts Univ. Sch. of Med. (Wynne I)*, 932 F.2d 19, 26 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993); *Wynne v. Tufts Univ. Sch. of Med. (Wynne II)*, 976 F.2d 791, 795 (1st Cir. 1992).

127. *McGregor*, 3 F.3d at 858.

128. *Id.*

129. *Id.* at 860.

130. *Id.* at 859.

131. *Jacobsen v. Tillmann*, 17 F. Supp. 2d 1018 (D. Minn. 1998).

132. *Id.* at 1021.

133. *Id.* at 1026. For another case involving a teacher seeking professional licensing, see *Panazides*, 804 F. Supp. at 803 (finding that even if plaintiff was disabled for purposes of the Rehabilitation Act of 1973, she had received reasonable accommodations, and her further request for unlimited time was not reasonable and would have amounted to a fundamental change to the test design).

disorder.¹³⁴ In *Maczaczjy v. New York*, the court held that although the institution offered a distance-learning program through which the plaintiff had earned his bachelor's degree, the master's program was not designed for distance delivery.¹³⁵ The school argued that personal attendance in the residency program was fundamental to the program and that students were expected to engage in intensive academic seminars, group discussions, presentations, and public critiques of each other's contributions.¹³⁶ The court stated:

The affidavits submitted by defendants demonstrate that administrators at Empire State College designed the residency program to achieve definite pedagogical objectives. The court does not wish to substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives.¹³⁷

Finally, in *Zukle v. Regents of the University of California*, Sherrie Zukle was diagnosed learning disabled in reading.¹³⁸ The University's Learning Disability Resource Center recommended various accommodations, all of which were granted.¹³⁹ Yet despite accommodations, Zukle was unable to pass her medical school courses and was finally dismissed.¹⁴⁰ Before her dismissal, Zukle requested that her clerkship schedule be rearranged.¹⁴¹ This request was denied, and Zukle sued, claiming that the failure to grant the requested accommodations violated the ADA.¹⁴² The district court concluded that since she was unable to meet academic standards, she was not otherwise qualified for medical school.¹⁴³ As a result, her ADA claim was rejected. On appeal, Zukle argued that the accommodations she received were not reasonable.¹⁴⁴ Reasonable accommodations in her case would have included: interrupting the sequence of required clerkships, leaving the hospital early during the in-hospital portion of clerkships to prepare for her written exams, and obtaining a decelerated schedule during the clerkship portion of her medical studies.¹⁴⁵ The University argued that these accommodations would substantially modify the program and lower academic standards.¹⁴⁶ The appellate court agreed and affirmed the lower court's determination that Zukle was not qualified for medical school.¹⁴⁷

134. *Maczaczjy*, 956 F. Supp. 403.

135. *Id.* at 406.

136. *Id.*

137. *Id.* at 409.

138. 166 F.3d 1041, 1043 (9th Cir. 1999).

139. *Id.*

140. *Id.* at 1044.

141. *Id.* at 1045.

142. *Id.*

143. *Id.*

144. *Id.* at 1046.

145. *Id.* at 1049–51.

146. *Id.*

147. *Id.* at 1051. See also *Panazides*, 804 F. Supp. at 803 (holding that Panazides was not otherwise qualified because she could not perform the "essential functions" of a public school

The foregoing cases illustrate that an institution's determination that it cannot waive a policy or grant an accommodation because to do so would fundamentally alter its academic program has been given deference by the courts. However, in two noteworthy cases, courts refused to grant blind deference to the assertion that requested accommodations would fundamentally alter academic programs. Instead, the courts ordered the institutions to deliberate and actually reach a rationally based decision about whether the compromised aspects of their programs were essential such that the requested accommodations would constitute a fundamental alteration.

The first of these cases is *Wynne v. Tufts University School of Medicine*.¹⁴⁸ On appeal, the court found the record insufficient to demonstrate that the university had rationally assessed its program to determine whether the requested accommodation of allowing oral testing for a medical student with cognitive deficits would fundamentally alter the program.¹⁴⁹ Tufts had filed only a single affidavit signed by the dean, with "no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made."¹⁵⁰ Summary judgment for Tufts University was vacated and the case was remanded.¹⁵¹

On the second appeal following remand, the court held that the university had carried its burden to undertake a rational assessment and had reached a conclusion that to allow oral testing would fundamentally alter its program.¹⁵² The court stated:

Following remand, Tufts satisfactorily filled the gaps that wrecked its initial effort at summary judgment. The expanded record contains undisputed facts demonstrating, in considerable detail, that Tufts'[s] hierarchy "considered alternative means" and "came to a rationally justifiable conclusion" regarding the adverse effects of such putative accommodations. Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, "the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry." Tufts likewise explained what thought it had given to different methods of testing proficiency in biochemistry and why it eschewed alternatives to multiple-choice testing, particularly with respect to make-up examinations. In so doing, Tufts elaborated upon the unique qualities of multiple-choice examinations as they apply to biochemistry and offered an exposition of the historical record to show

teacher; Panazides had taken the teacher's examination multiple times, both with and without accommodations, yet could not pass).

148. *Wynne II*, 976 F.2d at 795.

149. *Wynne I*, 932 F.2d 19.

150. *Id.* at 28.

151. *Id.*

152. *Wynne II*, 976 F.2d at 795.

the background against which such tests were administered to Wynne. In short, Tufts demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate Wynne's professed disability. It concluded that to do so would require substantial program alterations, result in lowering academic standards, and devalue Tufts'[s] end product—highly trained physicians carrying the prized credential of a Tufts degree.¹⁵³

The court deferred to Tufts's decision that to deviate from its multiple-choice testing policy "would require substantial program alterations, result in lowering academic standards, and devalue Tufts'[s] end product—highly trained physicians carrying the prized credential of a Tufts degree."¹⁵⁴

The second case is *Guckenberger v. Boston University*.¹⁵⁵ In this much celebrated case, a group of learning disabled students brought a class action suit against Boston University (BU), claiming that BU's treatment of mentally disabled students violated the ADA, Rehabilitation Act, and state law.¹⁵⁶ The students claimed that BU's policy violated the law in three respects: (1) It was overly burdensome in requiring students to be re-tested every three years and prohibiting evaluations by professionals other than physicians, clinical psychologists, or licensed psychologists; (2) it failed to provide reasonable procedures for reviewing a student's request for accommodations; and (3) it wrongly instituted an across the board policy precluding course substitutions in foreign language and mathematics.¹⁵⁷ Over the course of a long, expensive battle, BU changed its policy on re-testing, allowing a waiver of the requirement where it was medically unnecessary, and restructured its policy on the qualifications of evaluators and review procedures.¹⁵⁸ Despite these changes, the court held that BU had failed to establish that evaluators with master's degrees and appropriate training and experience could not assess a learning disability as well as an evaluator with a doctorate.¹⁵⁹ The court further held that the ban on course substitutions had been instituted without appropriate consideration.¹⁶⁰ BU was ordered to undertake a diligent assessment of course substitutions as an available accommodation to disabled students.¹⁶¹ The court endorsed the following test taken verbatim from the decision in *Wynne I*:

If the institution submits undisputed facts demonstrating that the

153. *Id.* at 794–95 (citations omitted).

154. *Id.* at 795.

155. *Guckenberger I*, 957 F. Supp. 306 (D. Mass. 1997); *Guckenberger II*, 974 F. Supp. 106; 8 F. Supp. 2d 82 (D. Mass. 1998) (order); 8 F. Supp. 2d 91 (D. Mass. 1998) (memorandum and order on assessment of attorneys' fees and costs).

156. *Guckenberger I*, 957 F. Supp. at 310–11.

157. *Id.* at 311.

158. *Guckenberger II*, 974 F. Supp. at 115.

159. *Id.* at 140.

160. *Id.* at 149.

161. *Id.* at 154–55.

relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.¹⁶²

After BU returned to court with a decision based on reasoned judgment, its decision that course waivers would fundamentally alter its liberal arts program was upheld.¹⁶³

The “fundamental alteration” test thus evolved through cases involving educational institutions. Until *Casey Martin*, it appeared that so long as an institution of higher learning actually engaged in deliberations about its program requirements, the courts would give great deference, refusing to substitute their decisions for that of the institution. It was against this jurisprudential background that *Casey Martin* took his disability-based discrimination claim to the courts.

VIII. CASEY MARTIN’S CASE

To rebut *Casey Martin*’s charge of disability-based discrimination in violation of the ADA, the PGA argued that the walking rule serves the fundamental purpose of injecting fatigue and anxiety into the tournament at this high qualifying level.¹⁶⁴ At trial, golf greats including Arnold Palmer, Jack Nicklaus, and Ken Venturi testified that “fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum.”¹⁶⁵ The PGA has waived the “no cart” rule on previous occasions, but for all players, thus honoring the age old concept of athletes competing under the same conditions.¹⁶⁶ The PGA has never granted a request for waiver on behalf of a single player.¹⁶⁷

The trial court consulted the Rules of Golf and found nothing to indicate that walking is required.¹⁶⁸ Further, the court found that the fatigue factor is not significant because under normal circumstances, very little energy is actually exerted by walking the course.¹⁶⁹ Against strong arguments from the PGA that it was inappropriate to consider *Martin*’s unique physical disability in determining whether a waiver of the “no cart” rule would fundamentally alter the tournament, the trial court undertook an “individualized assessment” and concluded that there

162. *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 87 (quoting *Wynne I*, 932 F.2d at 26).

163. *Id.* There were many claims and decisions made in the *Guckenberger* case. My reference to the case here is for the limited purpose of illustrating the court’s treatment of the issue involving whether a waiver of course requirements at a liberal arts institution would fundamentally alter BU’s program. The court finally accepted BU’s contention that it would. *Id.*

164. *Martin v. PGA Tour, Inc.*, 994 F. Supp. at 1250–51.

165. *PGA Tour, Inc. v. Martin*, 532 U.S. at 670–71.

166. *Martin v. PGA Tour, Inc.*, 994 F. Supp. at 1249.

167. *Id.*

168. *Id.* (citing the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland).

169. *Id.* at 1250–51.

would be no unfairness to the other players.¹⁷⁰ Even with a cart, Martin would still suffer greater fatigue and stress than other players.¹⁷¹ The court concluded that to waive the “no cart” rule was a reasonable accommodation for Martin that would not fundamentally alter the PGA tournament.¹⁷² The PGA was ordered to waive the “no cart” rule.¹⁷³

On appeal, the decision was affirmed.¹⁷⁴ The appellate court agreed that shot-making, and not walking, is essential to the game of golf.¹⁷⁵ The court further agreed that an individualized determination of the facts in each particular case was appropriate to the ADA analysis.¹⁷⁶ The PGA appealed to the United States Supreme Court.

In the Supreme Court, the lawsuit focused on two issues: 1) whether Title III of the ADA applied to this private, non-profit event with respect to Martin, a competitor in the event as opposed to a spectator at the event; and 2) whether a waiver of the “no cart” rule would fundamentally alter the nature of the PGA tournament.¹⁷⁷ On the first issue, the Court ruled that the tournament is a public accommodation under Title III, because any member of the public may pay \$3,000, submit two letters of recommendation, and enter the qualifying “Q-School.”¹⁷⁸ As to the second issue, which is the subject of this paper, the Court held that a waiver of the rule against using a cart would not fundamentally alter the tournament because walking from hole to hole is not essential to the game of golf, and given the severity of Martin’s condition, allowing him to use a cart would not give him an unfair advantage.¹⁷⁹

According to Justice Stevens, writing for the majority:

In theory, a modification of petitioner’s golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the

170. *Id.* at 1249.

171. *Id.* at 1251.

172. *Id.* at 1253.

173. *Id.*

174. *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000).

175. *Id.* at 1000.

176. *Id.* at 1002.

177. *PGA Tour, Inc. v. Martin*, 532 U.S. at 664–65.

178. *Id.* at 665–66. A thorough analysis of the issue as to whether Title III of the ADA applies to the PGA is beyond the scope of this article. The various opinions, including Justice Scalia’s dissent, provide an illuminating exposition of this issue.

179. *PGA Tour, Inc. v. Martin*, 532 U.S. at 683–84.

character of the competition.¹⁸⁰

The court disagreed with the PGA's assertion that the "no cart" rule was essential, and thus went on to determine whether a modification of that non-essential rule would nevertheless make the competition unfair such that it would fundamentally alter the game. In upholding the decision in favor of Martin, the Court endorsed the lower courts' individualized assessment of the details of Martin's disease in determining whether a particular modification or accommodation would fundamentally alter the game.¹⁸¹

Justice Scalia, joined by Justice Thomas, dissented. The dissent noted that the rules of all games are arbitrary; therefore, only the rule-maker can pronounce one or another of them to be essential or nonessential.¹⁸² Justice Scalia questioned how the Court could be so sure that the size of the hole (three inches) is essential to the game of golf, and just as sure that walking is not:

One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)¹⁸³

Justice Scalia noted that the nature of competitive sport depends upon unevenly distributed athletic talents such as speed, agility, and strength.¹⁸⁴ Any modification or accommodation to the rules that make it easier for a player to compete is against that nature, and fundamentally unfair.¹⁸⁵ Justice Scalia would have deferred to the PGA's determination.

IX. WHAT IMPACT COULD *MARTIN* HAVE ON DISABILITY DISCRIMINATION CASES BROUGHT BY STUDENTS AGAINST EDUCATIONAL INSTITUTIONS?

Martin could prove favorable for disabled students. First, it is Supreme Court precedent for refusing to defer to an accommodation decision in a disability discrimination case. Second, it is Supreme Court precedent explaining that *Sutton* requires an individualized analysis in accommodation decisions. Both of these contentions will be put forth by disabled students seeking greater accommodations than colleges and universities are willing to give. Courts may be persuaded by these arguments. These arguments are considered below.

180. *Id.* at 682–83 (citations omitted).

181. *Id.* at 688 (citing S. REP. NO. 101-116, at 61 (1989); H.R. REP. NO. 101-485(II), at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 385).

182. *Id.* at 699 (Scalia, J., dissenting).

183. *Id.* at 702–03 (Scalia, J., dissenting).

184. *Id.* at 703 (Scalia, J., dissenting).

185. For a discussion of the *Martin* case, see Darryl L. Liguori, *Fore! The Supreme Court Tees Off a Standard to Apply the Americans With Disabilities Act to Professional Sports in PGA Tour, Inc. v. Martin*, 12 WIDENER L. J. 185 (2003). For a general discussion of cases involving student athletes, see Denbo, *supra* note 12.

A. Martin Is Supreme Court Precedent Refusing To Defer To An Accommodation Decision In An ADA Case

Martin demonstrates the Supreme Court's willingness to disregard a decision by the governing authority (institution) that a modification or accommodation of the rules would fundamentally alter the program. In *Martin*, the courts recognized that the PGA considered the "no cart" rule essential such that a modification or accommodation of the rule would fundamentally alter the tournament, but then disregarded that decision in favor of their own interpretation of the Rules of Golf and the essence of the game. Unless there is a compelling reason for treating accommodation decisions by institutions of higher learning differently from the same decisions made by professional sports organizations, *Martin* is precedent for courts to substitute their judgments about whether a rule or policy is essential and would fundamentally alter programs.

How then might the accommodation decision in *Martin* be distinguished from accommodation decisions made by institutions of higher education? Colleges and universities might argue that decisions made by sports organizations are not entitled to deference for the following reasons: (1) the rationale for judicial deference to academic decisions does not apply to decisions by sports organization; and/or (2) that accommodation decisions by sports organizations are not as important as the same decisions made in the context of higher education and therefore, do not merit deference. Each of these arguments is considered below.

1. Martin Can Be Distinguished Because The Rationale For Judicial Deference To Academic Decisions Does Not Apply To Decisions By Sports Organizations

The courts have a long history of deferring to academic decisions made by educational institutions.¹⁸⁶ Deference to academic decision-making finds its root in the First Amendment to the United States Constitution and finds expression in such famous cases as *Regents of the University of California v. Bakke*,¹⁸⁷ where the Supreme Court stated:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of

186. For a thorough treatment of this issue, see Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (pointing out that this deferential treatment by the courts does not extend to decisions made by lower educational institutions, such as elementary and secondary schools).

187. 438 U.S. 265 (1978).

a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁸⁸

The notion that academic freedom requires some autonomy for academic decision-making was endorsed in *Board of Curators of University of Missouri v. Horowitz*, where the Court stated: “Courts are particularly ill-equipped to evaluate academic performance.”¹⁸⁹ And in *Regents of the University of Michigan v. Ewing*, the Court upheld the University’s refusal to allow a student in the Inteflex medical school program to retake part of the NBME qualifying examination.¹⁹⁰ Ewing claimed that the University’s decision to dismiss him from the program violated his rights to Due Process under the Fourteenth Amendment of the U.S. Constitution.¹⁹¹ The Court said:

The record unmistakably demonstrates, however, that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁹²

According to James Leonard, the basis for deference to institutions of higher learning in disability decisions is not found in the First Amendment, but in a common law principle requiring courts to abstain from interfering in academic decision-making.¹⁹³ Reasons cited for the deference principle include the antiquated notions that colleges and universities must control student behavior as they are responsible for moral development, the idea that higher education exists in a “separate realm” to be kept free of judicial interference, and the still current contention that courts lack relevant expertise in academic matters and are thus incompetent to review academic decisions.¹⁹⁴ The incompetence rationale appears to provide the basis for judicial deference in the majority of disability discrimination cases that reach the courts.¹⁹⁵

188. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

189. 435 U.S. 78, 92 (1978).

190. 474 U.S. 214 (1985).

191. *Id.* at 215.

192. *Id.* at 225 (citations omitted).

193. James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of The Americans With Disabilities Act*, 75 NEB. L. REV. 27, 57–60 (1996) (noting that whether this common law abstention principle can be called a “doctrine” is debated).

194. *Id.* at 58–59 (citing J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 257, 325 (1989)).

195. *See, e.g., Doe v. N.Y. Univ.*, 666 F.2d 761, 775–76 (2d Cir. 1981) (where the court’s concern regarding the incompetence of the judiciary to review academic decisions is apparent).

The notion that courts are incompetent in specialized areas where they lack expertise also finds expression in cases involving other types of professional organizations. Leonard notes that even outside the realm of higher education, courts defer to decisions by public officials when those officials have expertise in the subject matter of the decision being made.¹⁹⁶ Leonard cites the *Arline* decision where the Court stated, *in dicta*: “school authorities should defer to the reasonable medical judgments of public health officials when assessing the risks of contagious disease.”¹⁹⁷ *Arline* involved the dismissal of a public school teacher who had a record of infectious tuberculosis.¹⁹⁸ As the following representative survey reveals, the very few cases involving athletes that have reached the courts also involve deference to decisions not made by academic institutions, but instead by sports organizations.¹⁹⁹

In *Sandison v. Michigan High School Athletic Association* (MHSAA), Ronald Sandison, a student athlete, requested that the MHSAA’s age limitation be waived.²⁰⁰ Sandison was learning disabled and had been put back a year in school, making him too old to participate.²⁰¹ The reasons for the age limitation were to prevent injury to players and to prevent unfair advantage by older, more physically mature students.²⁰² The court deferred to the MHSAA, holding that the age limitation was an essential aspect of the program and that a waiver would fundamentally alter the program.²⁰³ Sandison urged the court to require the MHSAA to undertake an individualized inquiry taking into consideration his particular body size and structure to determine if in *his* case, a waiver would not compromise the essential purposes of the rule.²⁰⁴ The court refused to require an individual assessment, stating that such an undertaking would be tremendously burdensome and was not required by the law.²⁰⁵

In *Ganden v. NCAA*, the court criticized *Sandison* for not engaging in an independent evaluation of the organization’s assertion that its purposes were essential and could not be waived without fundamentally altering the program.²⁰⁶

196. Leonard, *supra* note 192, at 70.

197. *Id.* (citing *Arline*, 480 U.S. at 288). See also *Strathie v. Dept. of Transp.*, 716 F.2d 227 (3d Cir. 1983) (stating that decisions by public officials that accommodations would fundamentally alter a program are entitled to deference so long as the relevant officials actually considered the requested accommodations and rejected them); *Doe v. Region 13 Mental Health-Mental Retardation Comm’n*, 704 F.2d 1402 (5th Cir. 1981) (deferring to a decision that a psychiatric worker was not otherwise qualified for the position due to her own psychiatric problems, so as not to second guess the program administrator’s expertise).

198. *Arline*, 480 U.S. 273.

199. See *Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir. 1995); *Bowers v. NCAA (Bowers II)*, 118 F. Supp. 2d 494, 520 (D.N.J. 2000); *Bowers v. NCAA (Bowers I)*, 974 F. Supp. 459 (D.N.J. 1997); *Ganden*, 1996 U.S. Dist. LEXIS 17368.

200. 64 F.3d 1026.

201. *Id.* at 1028–29.

202. *Id.* at 1035.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Ganden*, 1996 U.S. Dist. LEXIS 17368, at *39–40.

At issue in *Ganden* was an NCAA rule requiring that certain “core” courses be taken by student athletes, and excluding courses taught below the regular academic instructional level.²⁰⁷ The court engaged in an independent evaluation of the “core course” rule, and determined that the rule was essential.²⁰⁸ The court went on to address *Ganden*’s contention that an individualized inquiry was necessary under the ADA.²⁰⁹ The court agreed, but held that the NCAA does an individual assessment through its waiver procedure, which requires consideration of each course and allows some lower level courses to count if they are similar in academic requirements to the upper level courses.²¹⁰ The NCAA’s “core course” rule was upheld.²¹¹

The last case to be examined here is *Bowers v. NCAA*, in which the NCAA’s “core course” rule was again considered by the courts. In *Bowers I*, the court denied plaintiff’s motion for a preliminary injunction, finding that because it appeared that the “core course” rule was essential and promoted the NCAA’s purpose of ensuring that student athletes are representative of the college community and are academically prepared to succeed in college, it was unlikely that plaintiff would be successful on the merits of his lawsuit.²¹² In *Bowers II*, the plaintiff had filed an amended complaint, and the NCAA was seeking dismissal on the grounds that it was not subject to Title III of the ADA.²¹³ The court found that the NCAA was subject to Title III, and further, that plaintiff could prevail if he could establish that a reasonable accommodation was available.²¹⁴ The court could not determine whether the “core course” rule was essential, however, because the NCAA had failed to present a fully developed record concerning this issue.²¹⁵ Nevertheless, the court concluded that because the waiver procedure in *Bowers* occurred too late to be effective in his case, it was not a reasonable accommodation.²¹⁶ The NCAA’s motion to dismiss was denied.²¹⁷

What the student athlete cases have in common with the education cases is that they all involve, at least in part, ADA Title III discrimination claims, and they all employ the fundamental alteration analysis established by the Supreme Court in *Davis*. Just as the courts in education cases require that the program at issue be essential, all of the student athlete cases have required that the purpose for the rule at issue be essential. As in education cases, some courts have deferred to the sports organization’s determination that the rule in question was essential and could not be waived without fundamentally altering the program.²¹⁸ Reminiscent

207. *Id.* at *4.

208. *Id.* at *43–48.

209. *Id.* at *48–49.

210. *Id.* at *49–50.

211. *Id.* at *51–52.

212. *Bowers I*, 974 F. Supp. 459.

213. *Bowers II*, 118 F. Supp. 2d at 514.

214. *Id.* at 515, 519.

215. *Id.* at 520.

216. *Id.* at 523–24.

217. *Id.* at 538.

218. *See Sandison*, 64 F.3d at 1034.

of *Wynne* and *Guckenberger*, at least one court found that without an adequate record, it could not determine if a policy or rule was essential.²¹⁹ It appears that the rationale for deferring to academic decisions in the disability context is the very same rationale that favors judicial deference in cases involving sports (and other) organizations.

A quite famous post-*Martin* deference case deserves mention in this context, for it too rested on the judicial incompetence rationale. In *Grutter v. Bollinger*, the recent affirmative action case that was brought against the University of Michigan Law School, the Supreme Court began its opinion upholding the Law School's race conscious, affirmative action policy by stating that it would defer to the Law School's determination that a diverse student body would be beneficial to the school.²²⁰ In so doing, the Court specifically noted that the Law School's decision was "based on its experience and expertise."²²¹

The *Grutter* decision will be cited by institutions of higher education in support of an argument for deference, because it is post-*Martin* and involves a decision by an academic institution. The similarities between the affirmative action policy in *Grutter* and accommodation decisions in cases brought under the ADA do not end here, however. Both types of decisions involve, at their base, selection of the student body. And, although the Supreme Court has disavowed the notion that accommodation is essentially affirmative action, after *Grutter* specified that colleges and universities must engage in an individualized assessment of each applicant for admission, post-*Grutter* affirmative action should be more like post-*Sutton* accommodation decisions.²²² Colleges and universities may be successful in arguing that *Grutter* has breathed new life into the deference doctrine, and that *Martin* is inapposite.

Grutter, however, is distinguishable. Unlike *Martin*, *Grutter* was not a statute based disability case, but rather, a Fourteenth Amendment based race discrimination case. Hitherto *Grutter*, all race discrimination cases were subject to strict scrutiny. While the Court in *Grutter* recognized its obligation to apply strict scrutiny to the Law School's race conscious admission's policy, the Court's use of the First Amendment based deference doctrine arguably negated any real scrutiny in the case. As Justice Scalia points out in his dissent, the deference doctrine has no place in strict scrutiny analysis. Indeed, Scalia says that judicial deference is "antithetical" to strict scrutiny, in which the parties are charged with proving that the asserted interest is compelling and that the classification is necessary; and the courts are charged with determining that that burden has been discharged.²²³ On

219. *Bowers II*, 118 F. Supp. at 520.

220. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

221. *Id.* at 333.

222. See *Alexander*, 469 U.S. at 300 n.20 (clarifying that affirmative action refers to a "remedial policy for the victims of past discrimination, while the later [reasonable accommodation] relates to the elimination of existing obstacles against the handicapped." For an interesting and informative discussion of this issue, see Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans With Disabilities Act*, 55 ALA. L. REV. 951 (2004).

223. *Grutter*, 593 U.S. at 362 (Scalia, J., dissenting).

the issue of judicial deference in a strict scrutiny case, *Grutter* has been the subject of volumes of scholarly debate.²²⁴ The Court's use of the deference doctrine to displace traditional strict scrutiny analysis limits the value of the opinion as precedent in both affirmative action and accommodation cases.

Furthermore, *Grutter* is distinguishable as an opinion that celebrates *inclusion* of disadvantaged students, not *exclusion* as occurs when colleges and universities decide not to grant a requested accommodation to a disabled student. The Law School contended that it was attempting to "enroll a critical mass of minority students" to promote diversity, which the Law School had decided was beneficial to learning.²²⁵ Many times throughout the opinion, the Court seizes this language to endorse the theme that education must be "open and available to all segments of American society, including people of all races and ethnicities."²²⁶ The deference doctrine was used in *Grutter* to promote accessible education. But in ADA cases, when the courts defer to decisions by institutions that a requested accommodation would fundamentally alter their academic programs, they are in effect excluding disabled students. Since a decision not to accommodate means that a disabled student will not receive alterations which are considered necessary for his or her academic success, the student may be forced to withdraw. Colleges and universities relying on *Grutter* may find that the opinion is actually better suited as precedent for students seeking to set aside a determination that a requested accommodation will alter the program.

To summarize: the argument that the rationale for judicial deference to academic decisions does not apply to decisions by sports organizations, is not likely to succeed. The rationale for judicial deference is always that courts lack expertise in academic matters. This rationale has supported judicial deference outside of academia, in cases involving decisions by public health officials, and in student athlete cases involving sports organizations. As a result, the rationale for the deference doctrine does not provide a basis for distinguishing *Martin*. Furthermore, it should be noted that *Martin*, like *Grutter*, is a case about inclusion. In this sense, *Martin* as a Supreme Court precedent in an ADA case, which fosters openness and inclusion of disadvantaged individuals, appears to be a more pointed precedent for cases involving disability based discrimination.

224. See, e.g., Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004); Victor Suthammanont, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. Sch. L. Rev. 1173 (2005); Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 Cath. U. L. Rev. 5 (2005); Paul Horowitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461 (2005).

225. *Grutter*, 539 U.S. at 333.

226. *Id.* at 334.

2. Martin Can Be Distinguished Because Accommodation Decisions By Sports Organizations Are Not As Important As Accommodation Decisions Made By Academic Institutions

Colleges and universities may seek to distinguish *Martin* because it involved a professional sports organization instead of an institution of higher education. This argument would have to be based on the dubitable premise that if the body making the decision is a college or university, the decision is somehow more important than a decision made by a different entity.²²⁷ The flaw in this reasoning is borne out by the district court's opinion in *Martin*. There, the court stated:

It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a *reasonable* modification be made to accommodate a disabled individual?²²⁸

The similarity between sports and education is readily apparent. Both are based on individual talent and skill. Both involve competition. Both require vigilant administration to ensure that no individual has an unfair advantage. When it comes to accommodating individuals with disabilities, the question of unfair advantage is always present. Even in employment, accommodation decisions involve considerations of fairness. Indeed, the ADA is supposed to achieve a level playing field, in which no individual has an unfair advantage. Hence, the argument that academic accommodation decisions are somehow more important than the same decisions made by sports (and other) organizations is untenable.

B. Martin Is Precedent For Requiring Institutions To Undertake An Individualized Assessment In Making Accommodation Decisions

The second way in which *Martin* could impact disabled students is that the courts could require the individualized inquiry that was required in *Martin*'s case. According to the Supreme Court in *Martin*, individualized assessment is required by the ADA. Citing *Sutton*, the Court stated:

Petitioner's refusal to consider *Martin*'s personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without

227. Dupre, *supra* note 185, at 452-53 (examining possible reasons for the different treatment given to lower education, hypothesizing that the difference may be due to the great respect that society has for higher education, and noting that lower education is not well respected).

228. *Martin v. PGA Tour, Inc.*, 994 F. Supp. at 1246.

exception that any “policies, practices, or procedures” of a public accommodation be reasonably modified for disabled “individuals” as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.²²⁹

To be fair to the courts in *Martin*, it should be noted that little is said in any of the courts’ decisions about the depth of the PGA’s deliberations over Martin’s request to waive the “no cart” rule. The district court noted in the final paragraph of its opinion that the PGA did not engage in the sort of individualized assessment that the ADA requires.²³⁰ Instead, the court said that the PGA asserted “in this case that any modification of any of its rules would fundamentally alter the nature of its competition.”²³¹ From this statement, it appears that the court rejected the PGA’s decision either because it did not engage in an individualized assessment for Casey Martin, or in the alternative, because it did not actually deliberate.

As the above quote from *Ewing* points out, deference is not to be given—even to purely academic decisions—when the decision departs from accepted academic norms, or when professional judgment was not actually exercised.²³² In both *Wynne* and *Guckenberger*, the courts are very clear about the need for deliberation. Indeed, both universities were ordered to deliberate.²³³ However, the sort of individualized assessment that the courts required in *Martin* does not appear to have been required in either case. Even so, *Wynne* and *Guckenberger* should have been precedent for allowing the PGA to deliberate (assuming that it had not done so), or even to engage in an individualized assessment. Rather, the courts simply rejected the PGA’s decision out of hand.

If the Court was wrong in its interpretation of the ADA statutory language in *Martin*, it is for the United States Congress to address. Until it does, to the extent an individualized assessment is now sanctioned by the Supreme Court, it is the law of the land. Colleges and universities across the nation should be advised that individualized assessment may be required, and that their decisions regarding what is essential to a particular degree program may not receive the deference traditionally given by the courts.

X. CAROL SINGH V. THE GEORGE WASHINGTON UNIVERSITY²³⁴

Singh is a recent post-*Martin* case that may signal a change in the treatment of

229. PGA Tour, Inc. v. Martin, 532 U.S. at 688 (citing 42 U.S.C. §§ 12101(b)(1), 12182(b)(2)(A)(ii)).

230. Martin v. PGA Tour, Inc., 994 F. Supp. at 1253.

231. *Id.*

232. *Ewing*, 474 U.S. at 225.

233. *See supra* Part VII.

234. 368 F. Supp. 2d 58 (D.D.C. 2005), *reconsideration denied*, 383 F. Supp. 2d 99 (D.D.C. 2005).

disability based discrimination claims brought by students against institutions of higher learning. Although its value is limited because it was decided on a motion for summary judgment, the case is instructive.

Carol Singh was admitted to the George Washington University decelerated medical program, designed for students with academic shortcomings but who show promise.²³⁵ The deceleration program allows students to take their first year of medical school over a period of two years.²³⁶ Students are made aware that they are subject to dismissal for failing grades, receiving conditional grades, and for being one standard deviation from the mean grade.²³⁷

During her first semester, Singh failed “Cells and Tissue” and was more than one standard deviation from the mean grade in “Physiology.”²³⁸ The Medical School Evaluation Committee (MSEC) recommended to the dean that Singh be allowed to stay in medical school so long as she passed “Cells and Tissues” in the summer, which she did.²³⁹ However, in the fall term, she failed “Neurobiology” and again fell below the standard deviation in yet another course.²⁴⁰ Again, she was allowed to stay in school if she passed “Neurobiology” in the summer.²⁴¹ Again, she passed that course and began another semester.²⁴² Once again, however, she failed a course and received a conditional grade.²⁴³

When her case came before the MSEC for a third time, the committee unanimously voted to dismiss Singh.²⁴⁴ By telephone, the associate dean informed her of the decision that evening.²⁴⁵ After being notified of her dismissal, Singh visited the University’s Disability Support Service (DSS) and was diagnosed with dyslexia, a mild disorder of processing speed, and a phonological disorder.²⁴⁶ The DSS recommended that she be given double time on exams, access to lecture notes, tutors, and a laptop computer for typing her exams.²⁴⁷ In light of her disability, Singh asked the dean to reconsider her dismissal, stating that with accommodation, she was sure to be a successful medical student.²⁴⁸ The dean, however, refused to reconsider her case.²⁴⁹

Singh sued, claiming that the dean’s refusal to reconsider her dismissal violated

235. *Id.* at 60.

236. *Id.*

237. *Id.* at 60–61. A conditional grade is given to students who cannot meet a minimum requirement without remedial work.

238. *Id.* at 61.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 61–62.

247. *Id.* at 62.

248. *Id.*

249. *Id.*

the ADA.²⁵⁰ The University argued: (1) that Singh was not substantially limited in a major life activity as compared to persons in the general population; (2) that the dismissal decision was based on the University's determination that Singh was not qualified for its program, which was an academic decision that should receive deference; and (3) that the requested accommodation, akin to receiving a second chance, was not reasonable, and therefore, not required by the ADA.²⁵¹

The court denied both party's motions for summary judgment on the issue of disability.²⁵² The court found a factual dispute as to whether Singh had a recognized impairment covered by the ADA, and further held that Singh had not shown that she was substantially limited in the major life activity of learning.²⁵³ On the question of whether Singh's limitation was substantial as required under the ADA, the court rejected the University's contention that Singh was more advanced than the ordinary person in the general population due to her academic success.²⁵⁴ The court determined that Singh should be compared to individuals of comparable experiences, finding that learning was like working, and when working is the asserted major life activity, it is a class of jobs that is considered, not all classes of jobs.²⁵⁵ As a result of these findings, the court denied summary judgment, but went on to consider the University's remaining contentions under the assumption that Singh was disabled within the meaning of the ADA.²⁵⁶

The University's contention that it should be accorded deference to its decision to dismiss Singh for being unqualified for the program due to failing grades met with similar defeat. The dean testified that he dismissed Singh solely because of her failing grades; the University argued that this was an academic decision entitled deference.²⁵⁷ The court, however, noted that the University had never undertaken a diligent assessment of Singh's request for accommodations in light of her disability as required by *Wynne II*.²⁵⁸

Considering the University's argument that Singh's request to be given a "second chance" was not a reasonable accommodation under the ADA, the court cited *Martin* for the proposition that discrimination under the ADA includes failing to make reasonable modifications where to do so would not fundamentally alter the

250. *Id.*

251. *Id.* at 69. The University also argued that Singh's request for reconsideration was untimely. The court found that since the letter of dismissal was actually written *after* the dean was informed of the disability, the request was in fact timely made. The court recognized that Singh had been informed by telephone before the University knew of her disability, but was persuaded that a University policy requiring dismissal by written notice rendered the telephone notice inoperable.

252. *Id.* at 68.

253. *Id.* at 63, 68.

254. *Id.* at 65-67.

255. *Id.* It is interesting to note that the court cited the *Toyota Manufacturing* case, yet this very finding by the court seems directly contrary to the Supreme Court's holding that the "class" concept in disability discrimination cases is reserved for the major life activity of working. See *supra* Part V.

256. *Id.* at 68.

257. *Id.* at 69.

258. *Id.*

University's program.²⁵⁹

The court discussed the "second chance" doctrine, and found that reconsideration as a modification was only considered unreasonable when the plaintiff had been given a prior chance to succeed *with* accommodations.²⁶⁰ The court concluded that the "second chance" doctrine would not apply to Singh since she has never been given even a first chance to succeed *with* accommodations.²⁶¹ As a result, the court held that reconsideration was a reasonable modification under the ADA.²⁶²

Singh is a recent disability based ADA case, which cites *Martin*. It is difficult to determine the impact that *Martin* may have had on the court's ultimate holding. Still, the decision is significant. First, the court refused to defer to a purely academic decision made by a university. Singh was dismissed due to multiple incidents of failing grades at a time when the University had no knowledge that she was disabled. When the University was informed of the disability, the dean made the decision not to reconsider her dismissal. These are decisions about who may study at the medical school. Under the First Amendment deference doctrine, these are precisely the decisions to which courts traditionally defer. Under the common law doctrine in which courts defer because they lack expertise, again, these are precisely the sort of complex academic judgments that courts are ill equipped to consider.²⁶³ Yet the court in *Singh*, like the court in *Martin*, refused to defer.

Second, as in *Martin*, the court found that the University did not undertake a *Wynne/Guckenberger* assessment, but did not order the University to deliberate. It should be recalled that in both *Wynne* and *Guckenberger*, when the courts determined that they could not give "blind deference" to an academic decision, they gave the universities time to go back and deliberate. Neither the PGA in *Martin*, nor the University in *Singh*, was given that opportunity.

Finally, once the court determined that the University did not consider Singh's request in light of her disability, it decided that reconsideration was reasonable, thus substituting its judgment for that of the University. This is exactly what happened in *Martin*. Like the court in *Martin*, the court in *Singh* determined that the requested accommodation was reasonable, and that failure to grant it amounted to discrimination. Although a summary judgment decision, *Singh* may be an example of post-*Martin* treatment of disability based discrimination claims brought by students against institutions of higher education.

XI. CONCLUSION

Depending upon one's stance in the controversy over accommodations for learning disabled students, *Martin* is either a threat or a promise. Colleges and

259. *Id.* at 70. The citation to *Martin* follows the quoted provision of the ADA on reasonable modifications.

260. *Id.* at 71.

261. *Id.*

262. *Id.*

263. In deciding the deference issue, the court made no mention of *Grutter*.

universities may err on the side of caution when they are taken to task by disabled students, attempting to prove that they not only undertook a *Wynne/Guckenberger* deliberation, but that they also conducted the sort of individualized inquiry sanctioned by the Supreme Court in *Martin*. Disability claimants may cite the case as precedent for courts to disregard decisions by institutions of higher education about whether a requested accommodation fundamentally alters an educational program. Whether *Martin* will have any real impact on higher education remains to be seen. It is a special case, involving a famous person. Special cases seldom make general law.²⁶⁴ It could happen that the decision simply stands as an anomaly in which a disability plaintiff actually won, but not of any real use to ordinary disability claimants such as the learning disabled students on campuses across the nation. Depending on one's viewpoint, that may be a sad result indeed.

264. *Cf.* *Bush v. Gore*, 531 U.S. 98 (2000).

COPYRIGHT IMPLICATIONS FOR ONLINE DISTANCE EDUCATION

AUDREY W. LATOURETTE, J.D.*

I. INTRODUCTION

Colleges, universities, and business organizations increasingly view online distance education as a viable mechanism for the delivery of education.¹ Distance education has been defined by the U.S. Copyright Office as that “form of education in which students are separated from their instructors by time and/or space,”² restricting its definition of distance education to “mediated instruction” in which the “teacher [is] active in determining the pace and content, as opposed to unstructured learning from resource materials.”³ Distance education employs a variety of technological media for purposes of delivery and communication, which include interactive television, satellite television, telephone and/or video conferencing, e-mail correspondence, and web-based distance learning via the Internet.⁴ Instruction delivered through the Internet is also variously termed “online learning, virtual learning, Web-based learning, technology-based learning, e-learning, network-based learning and computer-based learning.”⁵ It should be

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1. See Chuck Trierweiler & Ray Rivera, *Is Online Higher Education Right for Corporate Learning?*, 59 TRAINING AND DEV. 44, 44–47 (Sept. 2005) (indicating that a majority of respondents to a survey, which sought to identify the perceptions of senior executives regarding the role of online higher education in corporate learning, anticipated continued growth in their organizations for online learning; a complete copy of the results of this survey can be found at http://www.astd.org/astd/research/research_reports).

2. See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 10 (1999).

3. *Id.*

4. See Alex Koohang, *Students' Perceptions Toward the Use of the Digital Library in Weekly Web-Based Distance Learning Assignments Portion of a Hybrid Programme*, 35 BRIT. J. OF EDUC. TECH. 617, 618 (2004). See also AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON DISTANCE EDUCATION (1999), available at <http://www.aaup.org/statements/Redbook/DistanceEd.HTM>.

5. Seung-won Yoon, *In Search of Meaningful Online Learning Experiences*, 100 NEW DIRECTIONS FOR ADULT & CONTINUING EDUC. 19, 20 (Winter 2003) (noting that the term “e-learning” is most commonly used in corporate settings).

noted that increasingly, distance education is being utilized to enhance and complement the traditional face-to-face classroom; this combination of conventional learning coupled with web-based asynchronous instruction is termed the hybrid instructional model,⁶ or the blended course.⁷ Touted as providing the best qualities of both traditional and distance education, this merged model is viewed by some commentators as the future of distance education.⁸ For purposes of this article, the term online distance education connotes that distance education which is achieved through the use of the Internet and encompasses both its online only format and its hybrid or blended versions.

Such online distance education affords the professor greater flexibility in curricular design, the capacity to continuously update learning materials utilized in a course, and the ability to engage in time-delayed communication or “asynchronous discussion in virtual classrooms.”⁹ Perceived benefits include the ability to reach those students in rural areas as well as those incapacitated by disabilities,¹⁰ and to provide a means to deliver courses and degree programs to those unable to attend traditional courses due to time, work, or family-related constraints.¹¹ The anticipated economic benefits associated with online education

6. Koohang, *supra* note 4, at 618.

7. See Alfred Ho, *Testing the Reluctant Professor's Hypothesis: Evaluating a Blended-Learning Approach to Distance Education*, 12 J. PUB. AFFAIRS EDUC. 81, 83–84 (Winter 2006) (describing courses that combine synchronous traditional learning with asynchronous distance learning as blended-learning distance education and classifying blended-learning into three types: (1) a course that blends in-class and online learning activities for a single group of students; (2) a face-to-face course taught by in-class and online instructors; and (3) a course that blends online students and face-to-face students who interact with each other and participate in the same class). *But see* Nancy D. Zelif, *Business Education Methods—A Splendid Blended Course*, 60 BUS. EDUC. FORUM 54, 54 (Feb. 2006) (defining a blended course as that which utilizes an online course management system and unites more than one section of the same course; but defining a hybrid course as a face-to-face course that incorporates online features using a course management system).

8. Ho, *supra* note 7, at 83 (suggesting that the blended format will become pervasive in distance education because it integrates the strengths of traditional and distance learning by affording more course design flexibility and time flexibility with learning activities, and by offering the opportunities for increased interaction among students and between students and instructors). *But see* Saxon G. Reasons, *Hybrid Courses—Hidden Dangers?*, 8 DISTANCE EDUC. REP. 3 (April 2004) (indicating that changing modes between online and traditional instruction can prompt confusion about class expectations among students who may face greater challenges than confronted in either an on campus course or a completely web-based offering).

9. Simon Marginson, *Don't Leave Me Hanging on the Anglophone: The Potential for Online Distance Higher Education in the Asia-Pacific Region*, 58 HIGHER EDUC. Q. 74, 75 (Apr. 2004).

10. See Cleborne D. Maddux, *Developing Online Courses: Ten Myths*, 23 RURAL SPECIAL EDUC. Q. 27, 27 (Spring 2004).

11. See Gary Wyatt, *Satisfaction, Academic Rigor and Interaction: Perceptions of Online Instruction*, 125 EDUC. 460, 460–61 (Spring 2005) (observing that distance education is not without its critics who regard the economic and human costs of developing online courses as a “drain from resources” that could be employed to strengthen the traditional class, and that some critics assert concerns regarding distance education with respect to quality control, intellectual property ownership, and lack of social interaction for students); *see also* Sean Smith, *The Positive and Challenging Aspects of Learning Online and in Traditional Face-to-Face Classrooms: A*

have prompted efforts to offer mass online programs with varying degrees of success. New York University (“NYU”) Online ended its operations after a brief, albeit expensive, foray into the mass distribution of online education; the University of Phoenix Online, in contrast, has effectively carved a niche in such mass offerings.¹² While one may debate whether online distance education will ever successfully replace traditional face-to-face instruction,¹³ there exists concurrence among many in higher education that online instruction can effectively serve as an innovative complement to traditional offerings.¹⁴ As a consequence, many colleges and universities are encouraging the development by their faculty of online education courses, both as a vehicle to attract a broader student base and enhance the profitability of the institution, and to posture themselves as institutions on the cutting edge of technology.¹⁵ Faculty are intrigued by the seemingly endless possibilities afforded by the Internet and the potential for enriching class offerings in an innovative fashion. What faculty may not consider are the copyright issues inherent in the online delivery of courses, or even when evincing sensitivity to the copyright implications, may lack the requisite tools to properly address the issues.¹⁶

The origins of this paper emerged precisely from such concerns evidenced by a colleague regarding the forthcoming creation of an online distance education course at Richard Stockton College of New Jersey. In 2005, Professor David Emmons, Dean Jan Colijn and Provost David L. Carr of Richard Stockton College requested that I address seven specific legal issues relevant to the copyright

Student Perspective, 20 J. OF SPECIAL EDUC. TECH. 52, 55 (Spring 2005) (observing that notwithstanding the increasing popularity of distance education from the perspective of students who value the time to reflect and work at one’s own pace, the literature suggests that the lack of social interaction, immediate feedback from professors and peers, and structure of the face-to-face classroom poses negative aspects of online distance education for some students).

12. See NYU Online, Other Distance Education Ventures Closed, 88 ACADEME 6 (Mar./Apr. 2002); University of Phoenix Online Looks to Repeat Academic Success in Corporate Training World, 8 LIFELONG LEARNING MKT. REPORT 1 (March 2003); Amy Barrett, Christopher Palmeri & Stephanie Anderson Forest, Hot Growth Companies, BUSINESS WEEK, June 7, 2004, at 86.

13. Maddux, *supra* note 10, at 29 (stating that despite predictions the Internet will profoundly and unalterably lead to the demise of the free standing four year college “there will always be undergraduate students who need and desire the social aspects of traditional, on-campus attendance.”); see also Marginson, *supra* note 9, at 89 (urging that replacing face-to-face delivery of education with online distance education is very difficult because traditional institutions benefit from “tradition and habit,” and moreover, that mass online education, to be economically viable, must achieve a very large market share).

14. See Michael Simonson, Growing by Degrees Latest Report From the Sloan Consortium, 7 QUARTERLY REVIEW OF DISTANCE EDUC. vii (2006); Sawai Siritongthaworn & Donyaprueth Krairit, Satisfaction in E-Learning: the Context of Supplementary Instruction, 23 CAMPUS-WIDE INFO. SYS. 76 (2006).

15. See Roy L. Simpson, *See the Future of Distance Education*, 37 NURSING MGMT. 42 (Feb. 2006); *Bringing Louisiana Back with Distance Education Learning*, 10 DISTANCE EDUC. REPORT 2, 8 (Apr. 2006).

16. Maddux, *supra* note 10, at 31 (observing that a number of myths and misconceptions have arisen with respect to the online delivery of courses and contending that one of the most dangerous is the myth that copyright issues are not a concern in distance education).

implications inherent in online education as embodied in a proposed course, entitled "Understanding September 11," that Professor Emmons sought to develop. Professor Emmons anticipated incorporating segments of a published documentary in the distance education course, portions of music and video presentations, as well as online photographs and links to relevant websites on the Internet. While this memorandum directly addresses those queries related to the use of copyrighted materials in Part XII, it first proceeds beyond the narrow focus of those issues in order to provide the broader context related to copyright law within which my responses to particular questions are framed. It should be cautioned that this area of the law is extremely complex, and that the nuances and details of the statutory framework are beyond the scope of this paper. This memorandum encompasses a review of the relevant statutory laws and case decisions, their applicability to this situation, and an examination of the manner in which some other colleges and universities address such issues, as reflected in their copyright policies. Finally, this article in Part XIII, advocates the steps Richard Stockton College and other institutions of higher learning should consider when adopting a comprehensive set of copyright guidelines that addresses concerns such as what constitutes fair use and how one may obtain permission from copyright holders, thus extending beyond the focus on ownership of intellectual property issues which typically comprise the essence of college and university policies regarding copyright.¹⁷

II. DEFINITION OF COPYRIGHT

Historically, the source of copyright law emanates from Article I, Section 8, Clause 8 of the U.S. Constitution which grants Congress the legislative power to provide for the award of copyrights and patents to "promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright protection endeavors to achieve this progress by awarding incentives to authors in order that they continue to produce intellectual and creative works. Thus, for a limited time, designated by Congress, the author may protect his economic interests in his intellectual property by pursuing infringement litigation against those who utilize his expression without permission, licensure, or payment. In exchange for this protection, upon the termination of the copyright period, the work enters the public domain in order to promote the distribution of knowledge and ideas and to stimulate further creative activity.¹⁸ Eliminated completely from the scope of copyright protection are those ideas which have not been translated to

17. See, e.g., STATE OF NEW JERSEY AND THE COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, AFT, AFL-CIO, AGREEMENT 93-96 (Oct. 15, 2003), available at <http://cnjscl.org> (follow "Agreements: PDF Full-Time 03-07 Agreement" hyperlink) [hereinafter AGREEMENT, STATE OF NEW JERSEY]. Employees are deemed owners of the copyright of scholarly and aesthetic works, including distance learning materials, unless the College commissioned the work, specifically assigned the employee to create the work, or the College provided more than incidental use of its facilities or financial support.

18. John A. Shuler, *Distance Education, Copyrights Rights, and the New TEACH Act*, 29 J. ACAD. LIBRARIANSHIP 49, 49 (January 2003).

a tangible form: procedures, processes, methods of operation, concepts, principles, or discoveries.¹⁹ Copyright law, in essence, affords a monopoly for a limited time to those artists who create works such as books, paintings, sculptures, architecture, software, movies, and music, among others.²⁰ It provides the copyright holder the ability to derive commercial benefit from the copyrighted material, reproduce and distribute copies of the work, create derivative works based on the copyrighted work, perform and display the work publicly, and to determine what parties and under what circumstances others may lawfully make copies of the copyrighted work.²¹

The Copyright Act of 1976 protects original, creative works that are “fixed in any tangible medium of expression”²² for a period of the author’s life plus seventy years, according to the most recent formulation set forth in the Copyright Term Extension Act of 1998 (“CTEA”), alternatively known as the Sonny Bono Copyright Term Extension Act,²³ which amended the duration of existing and future copyrights in 17 U.S.C. § 302 and § 304 from the life of the author plus fifty years. Pursuant to CTEA, copyrights held by corporations endure for ninety-five years from the publication date or 120 years from the creation date, whichever is shorter. The Act also extended the copyright protection by twenty years for copyrighted works that were published prior to January 1, 1978, thus deferring the time that these works shall pass into the public domain and be available for general use.²⁴ As a result of CTEA, only works published in 1922 and earlier are deemed

19. 17 U.S.C. § 102(b) (2000).

20. 17 U.S.C. §§ 102(a), 103 (2000). The types of works protected, as articulated in the statute, include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, architectural works, and compilations and derivative works to the extent they exhibit original authorship, without implying any exclusive right in the preexisting material employed in the work.

21. 17 U.S.C. § 106 (2000).

22. 17 U.S.C. § 102(a) (2000).

23. 17 U.S.C. §§ 302–304 (2000). The statute extended protection of intellectual property by twenty years. The statute is sardonically referred to as the Mickey Mouse Protection Act, as prior to the enactment of the Copyright Term Extension Act, several characters owned by the Walt Disney Company confronted imminent passage into the public domain.

24. Some commentators caustically urge that continued copyright protection extensions promulgated by Congress will eventually erode the viability of the public domain. See Danny Duncan Collum, *Plagiarize This*, 33 SOJOURNERS 40 (July 2004). Others voice objections to continued congressional extensions of the limited protection afforded copyrighted works by urging that the “wellspring of public knowledge must be replenished every generation.” Shuler, *supra* note 18, at 50. Some individuals and businesses whose copyrighted works had gone into the public domain challenged the constitutionality of CTEA, asserting that the CTEA extension of existing copyrights violated the “limited” times prescription of the Constitution’s copyright clause, among other arguments. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the U.S. Supreme Court upheld the increased duration of existing and future copyrights as articulated in the amended 17 U.S.C. §§ 302–304 to be within the purview of congressional power as enunciated in Article I, Section 8, Clause 8 of the Constitution. The plaintiffs had raised objections to the extension of life plus seventy years for published works with existing copyrights, viewing their current limited time as establishing a constitutional boundary which could not be altered. Disagreeing with this contention, the Court deemed the exercise of congressional legislative

to be in the public domain; those copyrighted works created in 1923 shall not enter into the public domain until January 1, 2019.

The definition of protectible works capable of receiving copyright protection has been extended to include the courseware (technology) and course content (professor's lectures) utilized in distance education.²⁵ It should be noted that courseware, as defined by Columbia University in its Copyright Policy,²⁶ is independent of the course content and encompasses the tools and technologies utilized to present the course content. This distinction proves relevant when one addresses issues of ownership, which shall be discussed below, of such copyrightable property. Course content ownership, "the intellectual content of the course,"²⁷ is traditionally viewed as within the purview of the professor who primarily creates the lecture and discussions. Courseware, which may require the input of technological staff, college financial resources, programmers, and designers, potentially gives rise to ownership claims by many competing authors or creators.

The copyright protection becomes operative immediately upon the creation of the original, tangible expression of the work of art. Prior to the enactment of the Copyright Act of 1976, the copyright did not exist until one had formally registered for such protection with the Copyright Office in the Library of Congress, and affixed the copyright notice to the tangible expression.²⁸ Since 1978, however, one's copyright exists from the moment the creation of the original, tangible expression has occurred and it is not deemed necessary to affix the copyright notice in order to secure the copyright protection. Therefore, one

authority under CTEA to be a rational one, in part because extending the term would ensure that American authors would receive the same copyright protection in Europe as their European counterparts who benefited from a European Union directive establishing a baseline copyright term of life plus seventy years. *Eldred*, 537 U.S. at 205.

25. The Copyright Act of 1976 mandates that a potentially copyrightable work must be both "original" and "fixed in a tangible medium of expression." 17 U.S.C. § 102(a) (2000). Commentators have noted that the subject matter that falls within the purview of copyrightable material under this statutory definition has been expanded and includes authorship of online course materials. The course components taken as a whole would qualify as original works of authorship and the components of an online course, "to the extent they embody material entered into a computer, should meet the fixation requirement as defined in *MAI Systems* [*MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)]." Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 8 (2001). In *MAI Systems*, the Ninth Circuit held that a copy of copyrighted software created in a computer's random access memory met the fixation requirement since it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* (quoting *MAI Systems*, 991 F.2d at 518).

26. See COLUM. UNIV., COLUMBIA UNIVERSITY COPYRIGHT POLICY, available at <http://www.columbia.edu/cu/provost/docs/copyright.html> (last visited Sept. 28, 2006).

27. *Id.* In Section 2, "Course Content and Courseware," Columbia University asserts copyright in course content and/or courseware which may be created under the aegis of a school or department of the University.

28. The copyright notice appears as: Copyright (dates) (owner) or Copyright © (dates) (owner). In the alternative, it sometimes appears in the © format alone or as the abbreviation "copr."

cannot justly conclude that because photographs or other media are observed on the Internet devoid of a formal accompanying copyright notice that these items are in the public domain. The fact that an item is available on the Internet cannot in any fashion be construed as voiding the need for permission to use that item unless the site expressly states that the article is in the public domain.

One who is deemed the author or creator of the copyrightable material is afforded several exclusive rights of ownership to the intellectual property by the Copyright Act, which include the following: the right to reproduce, or make copies of the work; the right to make revisions; the right to distribute or publish the work; and the right to publicly display or perform the work.²⁹ These rights can only be exercised by the copyright owner unless one is given permission to do so, or unless one satisfies the fair use exception explained below. Therefore, according a work proper attribution, while certainly ethical and satisfying the requisites necessary to avoid a charge of plagiarism, will not serve in any manner to defeat a copyright infringement claim. Attribution is simply no substitute for garnering the permission of the copyright owner to utilize and economically benefit from his creation.

III. FAIR USE EXCEPTION AND TEACHER'S EXEMPTION

A thorough understanding of the fair use exception and teacher's exemption pursuant to 17 U.S.C. § 107 is crucial to determining when one may reasonably avoid the strictures of the Copyright Act of 1976, both within the traditional classroom and in distance education, with respect to utilizing an author's work without permission. Fair use is inextricably intertwined with the notion of the teacher's exemption as articulated in Section 107 of the Copyright Act which states: "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." Further, Section 110 (1) of the Copyright Act affords exemptions for teachers for classroom copying and permits, in the context of a traditional face-to-face classroom in a nonprofit educational institution, the teacher to utilize the performance or display of copyrighted works. However, in order for the faculty member to copy or display works without infringing copyright, he or she must still comply with the requisites of fair use. This area of the law, it is cautioned, is fraught with vagueness; one federal court deemed it "one of the most unsettled areas of the law,"³⁰ observing that the "statutory factors are not models of clarity, and the fair use issue has long been a particularly troublesome one."³¹ Misinterpretation and misuse of this concept abounds in academia as many espouse the incorrect notion that a nonprofit college or university is afforded a *carte blanche*³² with regard to distributing copies

29. 17 U.S.C. § 106 (2000).

30. *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1392 (6th Cir. 1996).

31. *Id.* at 1390 (citing Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting)).

32. For a description of the "unfettered" rights of instructors to use "any and all copyrighted

of copyrighted work both within and without the classroom or displaying or performing copyrighted works as long as it has an educational purpose, is not done for profit and/or as long as the original author was cited. Fair use, however, does not provide a right to utilize copyrighted materials without permission. Instead, it offers an affirmative defense to allegations of copyright infringement, and thus, cannot be broadly interpreted to afford anything other than very limited rights to another's intellectual property even in the context of educational purposes.

Section 107 of the Copyright Act of 1976 sets forth the four criteria which should be applied to the circumstances of a particular use within the educational context, in order to determine whether that use does, in fact, comport with the mandates of fair use. The four factors delineated by the statute are: (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 of the work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market or value of the copyrighted work. It should be noted that these four factors have been afforded no "bright line" determinations by the courts as to what constitutes fair use;³³ instead, courts signify that the equities inherent in a particular situation must be considered. It is also significant to observe that the fair use exception as embodied in the 1976 Act pertains solely to the traditional classroom and not to online education. Section 110(1) of the Copyright Act authorizes nonprofit educational institutions to use the performance or display of copyrighted works in the classroom,³⁴ subject to fair use, but afforded no authorization for distance learning prior to the enactment of the Technology Education and Copyright Harmonization Act of 2002 (hereinafter referred to as the TEACH Act), which has amended Section 110(2).³⁵ The employment of the fair

materials without permission," see Judy Dahl, *Working With—and Around—the TEACH Act*, 8 DISTANCE EDUC. REP. 1, 4–6 (March 1, 2004). The fact that despite "fair use," professors may still feel constrained in the classroom with respect to the use of copyrighted materials is evident in the attempt three University of Pennsylvania professors made in requesting that the U.S. Copyright Office afford faculty greater freedom in the use of copyrighted DVDs for film classes. Anne Dobson, *Professors to Challenge Copyright Law*, DAILY PENNSYLVANIAN, Mar. 21, 2006, at 1–2.

33. See Andre Hampton, *Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already be in Trouble*, 28 OKLA. CITY U. L. REV. 223, 231 (2003) (quoting Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 627 (2001)).

34. 17 U.S.C.A. § 110(1) (2005). The section sets forth the following exemption to copyright infringement claims regarding certain performances and displays:

- (1) Performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Id. Pursuant to § 110(1) it is thus permissible, within the confines of a traditional classroom, to perform or display works such as a play, movie, poem or photograph.

35. See *id.* While teachers in traditional classrooms could perform or display all types of

use doctrine requires a balancing of the rights of the publishers and authors to control and garner legitimate profits from their efforts versus the ability of the educator to enhance in a good faith manner one's classroom offerings by utilizing the information present in copyrighted work. It is not a requisite of fair use that all four factors be equally satisfied; rather, the analysis of fair use is conducted on a case by case basis to determine whether the use can be excused as an acceptable departure from copyright constraints.

With respect to the first factor (nonprofit vs. commercial), nonprofit educational purposes exert significant weight in construing the use of copyrighted materials in classrooms or in distance education as one of fair use. Once that use becomes commercial, the availability of claiming fair use as a defense is significantly weakened (some would urge it is nullified), for the endeavor is no longer purely educational in purpose, and it will generally be recommended that permission or the payment of royalties pursuant to a license be obtained. For example, if a faculty member or his or her institution endeavors to market an online distance education course to other institutions, such conduct would likely be characterized as commercial, thus rendering it ineligible for the fair use defense. With regard to the second factor (nature of the work), it is generally viewed that the more factual and less creative the copyrighted material is, the more it favors the application of fair use. In contrast, highly creative material such as music, movies, short stories, and fictional work weighs against construing the work as one subject to fair use and obtaining permission is recommended. It is argued that transformative uses of a work which add "something new, with a further purpose or different character," will be "generally favored in considering this factor in fair use determinations."³⁶

With respect to the third factor (portion used), the determination of how large a portion of the work is utilized is a very subjective one which prompted numerous guidelines to be promulgated. The legislative history to the Copyright Act of 1976 indicates that "Classroom Guidelines" were developed by representatives of relevant parties such as authors, publishers and professional education associations to provide clarity with regard to the fair use application to the reproduction of copyrighted works in the classroom.³⁷ With respect to multiple copies of a protected work for distribution to a class, the Guidelines suggest that the use of the copies must satisfy the requirements of brevity, spontaneity, cumulative effect and notice.³⁸ Thus, one may copy a complete article of less than 2,500 words if the article is a timely enhancement to a topic that is currently being addressed and it

copyrighted works under § 110(1) of the Copyright Act, those in online distance education could only perform copyrighted nondramatic literary or musical works. *See also* Kristine H. Hutchinson, Note, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2213 (2003) (noting "[A] distance educator could show stills from a motion picture, but could not show even portions of the film itself. . . . [This] caused students in online courses to have less engaging and effective educational experiences.").

36. JOHN VAUGHN ET. AL., ASS'N OF AM. UNIVS., *CAMPUS COPYRIGHT RIGHTS AND RESPONSIBILITIES: A BASIC GUIDE TO POLICY CONSIDERATIONS* (2005), available at http://www.aapnet.org/aboutup/issues/Campus_Copyright.pdf.

37. *Id.* at 11.

38. *Id.*

would be unreasonable to obtain permission within the limited time frame. Moreover, to comport with the cumulative effect test, the copying of the complete article can only be utilized in one course, each copy must include a notice of copyright and the copying cannot be repeated from one semester to another or the cumulative impact is equivalent to an unauthorized "publishing" of the copyrighted work. The expectations are that given sufficient time, faculty would secure formal copyright permission from the author if one were to use this article in a subsequent semester; "spontaneity" would no longer provide an exception in long term planning. Clearly, the smaller the amount of the work to be utilized, the more likely it is that the balance with which one must engage will weigh toward fair use. However, even copying a small portion of a copyrighted work, if that section represents the essence or heart of the work, may be construed as weighing against the application of fair use. How small is small? That depends on the totality of the copyrighted work; forty five seconds of a one minute commercial would prove too large for fair use to apply; a single chapter from a book would be deemed acceptable under fair use standards.³⁹

Lastly, the fourth factor (the effect on the market for the protected work) has been construed by the United States Supreme Court⁴⁰ as one that may prove determinative of the viability of the fair use defense. In a traditional classroom context with face-to-face teaching and limited amount of copies being disseminated, one need only consider the potential market value impact the copying will have on the students in that class with respect to sales of the copyrighted work to determine if fair use applies. The vehicle of online education permits educators to place all forms of intellectual property on the Internet and coupled with distance education's potentially vast audience, enormously enhances the possibility of significant market harm to the creator/owner of the copyright if the works are widely disseminated. Moreover, because the teaching exemption under the Copyright Act was not afforded to distance education (as it is not a place typically devoted to classroom instruction and its transmissions of copyrighted materials may be deemed rebroadcasts) prior to the 2002 TEACH Act, those involved in online education pursuant to this statutory scheme were generally compelled to secure permission from copyright owners or to obtain costly licenses. It should be noted that while some urged that fair use applied to distance education under the 1976 Copyright Act, copyright holders narrowly construe the use of this

39. Guidelines for copying works for teaching purposes were promulgated by the Association of American Publishers and the Author's League of America. For an adaptation of these guidelines, see UNIV. OF TEX. SYS., GUIDELINES FOR CLASSROOM COPYING OF BOOKS AND PERIODICALS, <http://www.utsystem.edu/ogc/intellectualproperty/clasguid.htm> (last visited Sept. 29, 2006). In making multiple copies of copyrighted works for classroom use, the guidelines suggest these limits:

- (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% of the work, whichever is less, but in any event a minimum of 500 words.

Id.

40. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

ambiguous exception in distance learning because it is an arena in which they accurately perceive the risks of serious market harm.

IV. TECHNOLOGY EDUCATION AND COPYRIGHT HARMONIZATION ACT (TEACH ACT)

Recognizing that a disparity existed between the traditional face-to-face classroom and distance education⁴¹ and seeking to further enhance the educator's ability to employ relevant copyrighted material in online education, Congress recommended in the Digital Millennium Copyright Act of 1998 (which implemented treaties signed in 1996 at the World Intellectual Property Organization conference)⁴² that a study should be conducted by the Register of Copyrights to promote distance education while maintaining balance between the copyright holders' wish to protect their markets and the educators' desire to integrate protected works into online courses. The legislative solution to this dilemma resulted in November of 2002 in the amendment to the Copyright Act of 1976 entitled Technology Education and Copyright Harmonization Act (TEACH Act) embodied in an expanded version of 17 U.S.C. § 110(2). The TEACH Act broadens the scope of copyrighted materials that faculty can digitally transmit in both distance education courses, and in the hybrid or blended modes of learning where online materials are utilized to supplement traditional face-to-face teaching. It now includes the entire performance of nondramatic literary or musical works, or reasonable and limited portions of any other work, and the display of a work in an amount comparable to that which is typically displayed in a traditional classroom.

The rights afforded under the TEACH Act apply to any nonprofit accredited educational institution.⁴³ Underlying this expansion of rights afforded the distance educator is the premise that the permitted performance or display shall be deemed an essential part of the class, conducted under the supervision of the instructor in

41. One commentator described the pre-TEACH Act copyright laws covering distance education as "draconian" in that the distance educator was only permitted to use still image displays such as slides or video frames, and nondramatic literary or musical works such as textbook pages, poetry, symphony, or pop music. Dahl, *supra* note 32, at 1 (citing Dr. Fritz Dolak, copyright and electronic resources librarian at Ball State University).

42. The Digital Millennium Copyright Act implemented two World Intellectual Property Organization treaties: the WIPO Copyright Treaty and the WIPO Performance and Phonogram Treaty, both of which "require member countries to provide protection to certain works from other member countries or created by nationals of other member countries." See U.S. COPYRIGHT OFFICE, U.S. COPYRIGHT OFFICE SUMMARY: THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998), available at <http://www.loc.gov/copyright/legislation/dmca.pdf>.

43. The American Library Association sets forth the standards for accreditation as follows: "For higher education, regional or national accrediting agencies recognized by the Council on Higher Education Accreditation or the U.S. Department of Education provide authorized accreditation. For primary and secondary institutions, applicable state certification or licensing agencies provide accreditation." KENNETH D. CREWS, AM. LIBRARY ASS'N, THE TEACH ACT AND SOME FREQUENTLY ASKED QUESTIONS (2006), <http://www.ala.org/ala/washoff/WOissues/copyrightb/distanceed/teachfaq.htm> [hereinafter AM. LIBRARY ASS'N, FAQs].

the context of “mediated instructional activities”⁴⁴ analogous to a traditional classroom session. The Congressional view of distance education is that it should occur “in discrete installments, each within a confined span of time, and with all elements integrated into a cohesive lecture-like package.”⁴⁵ Mediated instructional activities must resemble traditional classroom conduct where students “will access each ‘session’ within a prescribed time period and will not necessarily be able to store the materials or review them later in the academic term; faculty will be able to include copyrighted materials . . . in portions or under conditions that are analogous to conventional teaching.”⁴⁶ While the TEACH Act does not define “class session,” it is clear that the legislative intent is that the length of time displays and performances of copyrighted material should be available to students should be for limited periods regarded as necessary by the instructor for that class instruction.⁴⁷ What is also readily apparent is that in accordance with restrictions imposed by the TEACH Act, which only permits the use of materials that would ordinarily be employed in a traditional classroom, mediated instructional activities do not include the following: student use of supplemental or research materials in digital form, such as work placed on reserve or electronic reserves with the library; use of works such as textbooks, coursepacks or other material typically purchased by students in higher education for their independent use in connection with a class;⁴⁸ or the posting by an instructor of entire journal articles for class purposes.

The TEACH Act, in essence, applies the teacher exemption and fair use defense to online education, but only to the extent that online delivery is a comparable

44. 17 U.S.C. § 110(2) (2002). This language suggests that the instructional activities cannot encompass the use of textbooks and other materials that are “typically purchased by the students.” *Id.* Professor of Law Kenneth D. Crews observes that: “The point of this language is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase the material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace.” KENNETH D. CREWS, COPYRIGHT MGMT. CTR., NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT, http://www.copyright.iupui.edu/teach_summary.htm (last visited Sept. 29, 2006) [hereinafter CREWS, MEANING AND IMPORTANCE OF THE TEACH ACT].

45. AM. LIBRARY ASS’N, DISTANCE EDUCATION AND THE TEACH ACT (2006), <http://www.ala.org/ala/washoff/WOissues/copyrightb/distanced/Default3685.htm> [hereinafter AM. LIBRARY ASS’N, DISTANCE EDUCATION].

46. *Id.*

47. *Id.* See also VAUGHN ET AL., *supra* note 36, at 14 (suggesting that the legislative history of the TEACH Act, as presented in the Conference Report, indicates that a class session is that period wherein “a student is logged on to the server of the institution” that is presenting the display or performance. While a class session is not comprised of the entire semester or term, and thus students’ access must be limited to the materials, the institution may maintain the materials on its server for the duration of its use, or the entire semester or term).

48. AM. LIBRARY ASS’N, FAQs, *supra* note 43. The American Library Association suggests that linking to a copyrighted work which may be available on another website provides a mechanism for an instructor to provide access to complete articles for his or her students in distance education and avoid copyright concerns about reproduction and publication of protected works.

replacement for the type of, and amount of, performance or display of materials that occurs in the classroom and that transmission be limited to students enrolled in the course. Thus, congruent with traditional classroom usages, under the TEACH Act entire performances of nondramatic literary or musical works are permissible in distance education, and the display of works such as images are permitted if in amounts akin to what is permissible in the traditional classroom.⁴⁹ Significantly, in the context of online distance education, the performances of dramatic literary and musical works (e.g., movies and plays), audiovisual works, and sound recordings must be limited to segments which are both “reasonable and limited portions.”⁵⁰

In response to the concerns of copyright holders alarmed about the potential for the unlawful dissemination of their protected expressions via distance education, the TEACH Act imposes additional requirements and constraints upon those faculty and institutions that utilize distance education and that wish to benefit from its statutory scheme. If the institutional policymakers, information technology staff, and faculty satisfy the requirements and operate within the imposed statutory constraints, instructors may use the designated copyright materials without securing permission, proffering payment, or committing copyright infringement.⁵¹

Firstly, with respect to institutional policymakers, pursuant to the mandates of the Act, the college or university must have a comprehensive copyright policy in place and students, faculty, and staff must be fully apprised of that policy.⁵² Ideally, it should commence with a statement of compliance with copyright laws to make it clear that institutional expectations regarding compliance by all institutional players is fully expected.⁵³ The formal copyright policy, which must

49. 17 U.S.C. § 110(2) (2002).

50. *Id.* Thus, while the TEACH Act does expand the rights afforded distance educators to use copyrighted materials to make it more comparable to the discretion enjoyed by educators in the traditional face-to-face classroom, notably there is “still a considerable gap between what the statute authorizes for face-to-face teaching and for distance education.” UNIV. OF TEX. SYS., THE TEACH ACT FINALLY BECOMES LAW, <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm> (last visited Sept. 29, 2006) [hereinafter UNIV. OF TEX. SYS., FINALLY BECOMES LAW]. While there are no limits and no permission required for showing or performing copyrighted works related to the curriculum in any medium in the traditional classroom, the distance educator must “pare down” some of the audiovisual works and dramatic musical works into reasonable and limited portions. *Id.*

51. See CREWS, MEANING AND IMPORTANCE OF THE TEACH ACT, *supra* note 44.

52. 17 U.S.C. § 110(2)(D)(i) (2002). See discussion *infra*, Part XIV.A.

53. See, e.g., TRINITY UNIV., TRINITY UNIVERSITY COPYRIGHT POLICY, *available at* <http://www.trinity.edu/home/copyright.htm> (last visited Sept. 29, 2006). The policy’s General Statement sets forth the following:

Trinity University endeavors to comply with copyright law and encourages all members of the Trinity community to obey the provisions of copyright law. Trinity understands that copyright law applies to digital resources and that any unauthorized redistribution of music, movies, text, software or other protected media may be a violation of the law. Various policies relevant to specific issues of copyright are referenced in links noted below. Please refer to them for detailed information on Trinity expectations related to conformance to copyright law.

Id.

encompass far more than the ownership issues currently addressed in Richard Stockton's union contract, for example, should also address fair use policies, obtaining copyright permission, and management of copyright issues by a permanently installed committee comprised of administration and faculty representation.⁵⁴ In a fashion similar to that espoused by Richard Stockton College and other universities with respect to their published sexual harassment guidelines, such an inclusive copyright policy would convey a college's bona fide intent to comport with the requirements of the statute and clarify the standards to which faculty must adhere when incorporating copyrighted works into distance or hybrid education. Secondly, the TEACH Act requires that copyright policy and information regarding copyright be distributed to "faculty, students and relevant staff members."⁵⁵ Thirdly, students must be notified that materials in the distance education course may be subject to copyright protection, which can consist of a brief statement included in distributed copyright information or in an opening frame of a distance education course.⁵⁶ And lastly, the college or university must make clear that the access to copyrighted materials utilized in distance education be made available solely to students officially enrolled in the course.⁵⁷

In accordance with the TEACH Act the college or university, through its information technology staff, must apply technological protection measures that provide both authentication of users to reasonably prevent unauthorized access to the copyrighted materials by persons other than enrolled students, and download controls which deter unauthorized retention and downstreaming or dissemination of the works by students as well.⁵⁸ Thus, password protection, which only addresses the issue of access and not dissemination, may not be sufficient to satisfy the requisites of the Act. In this manner the TEACH Act endeavors to afford copyright owners a high degree of protection, with the ultimate goal of protecting the markets of the copyright holders. Moreover, there are limits with regard to how long the copyrighted content may be maintained on the network. The information technology staff must prevent students from "capturing" material for longer than a class session, and must prevent redistribution of copyrighted material.⁵⁹ In addition, the IT staff must ensure that all copyrighted materials used

54. For a review of the copyright policies of twenty-five institutions of higher learning, see Andrea L. Johnson, *Reconciling Copyright Ownership Policies for Faculty-Authors in Distance Education*, 33 J.L. & EDUC. 431, 434 (Oct. 2004) (concluding that fifteen of them had promulgated copyright policies related to ownership issues, while only ten had addressed the fair use doctrine as applied to copyrighted materials).

55. 17 U.S.C. § 110(2)(D)(i) (2002). It is suggested that the institution may comply with this requirement in a variety of ways: a website may be established that would set forth the college or university's copyright policy, providing examples of its various tenets; printed materials may be distributed to the relevant college or university constituencies; and workshops may be conducted sensitizing those constituencies to the laws of the United States regarding copyright. AM. LIBRARY ASS'N, DISTANCE EDUCATION, *supra* note 45.

56. AM. LIBRARY ASS'N, DISTANCE EDUCATION, *supra* note 45.

57. *Id.*

58. 17 U.S.C. § 110(2)(D)(ii)(1aa-bb) (2002).

59. Carol Simpson, *TEACHing and the Internet*, 24 LIBR. MEDIA CONNECTION 23, 24 (Aug./Sept. 2005).

in class sessions include credits and copyright statements and that students are not permitted long term retention of materials.⁶⁰ Finally, pursuant to the Act, it is the responsibility of this staff to guarantee that the college or university cannot interfere with technological measures utilized by copyright owners that prevent retention or unauthorized further dissemination.⁶¹

The TEACH Act also imposes affirmative responsibilities upon the faculty member utilizing copyrighted materials in distance education that include, among many others, assurances that only proper materials are used, which would include performances of nondramatic literary and musical works, and reasonable and limited portions of other works, including dramatic works and audiovisual works.⁶² The TEACH Act addresses solely in-class performances and displays of copyrighted works and does not include works a professor may instruct his students to read or view outside of class.⁶³ For those works, fair use must be relied on. Further, an instructor may not utilize works that are marketed for online learning as part of digital curriculums, electronic databases or learning systems, nor may an instructor digitize sections of textbooks or other books that students would in the ordinary course of events be expected to purchase.⁶⁴ Other excluded works would include performances or displays premised on copies that were not lawfully made and performances or displays arising from the conversion of materials from analog into digital formats, except under certain permitted conditions.⁶⁵ Further, the faculty member assumes overall responsibility for oversight to ensure that the protected works selected for class use are for educational purposes only and serve as an integrated part of a class session that is part of mediated instructional activity controlled by the instructor which is analogous to what occurs in the traditional classroom. The selected works may not be employed by the instructor for entertainment or enrichment purposes.⁶⁶ Finally, the instructor must make certain that permitted copyrighted materials are available to students only for the time necessary to teach a class session, that the materials are stored in a secure server, and that the copyrighted materials utilized adhere to the type and amount the TEACH Act authorizes. University supported course

60. *Id.*

61. 17 U.S.C. § 110(2)(D)(II) (2002).

62. Thus, pursuant to these guidelines, an instructor may play entire pieces of nondramatic music, but may only show "reasonable and limited" portions of musicals, movies, and operas in a distance education course. Simpson, *supra* note 59, at 24.

63. See UNIV. OF TEX. SYS., FINALLY BECOMES LAW, *supra* note 50.

64. Using works that are intended for use as online learning materials "would deprive the copyright owner of a sale of a license for these materials" and hence, even under a fair use argument would be violative of the owner's copyright. Simpson, *supra* note 59, at 24.

65. Materials may be converted from analog to digital only if the amount to be converted is "limited to the amount of appropriate works that may be performed or displayed pursuant to the revised Section 110(2)" and a digital version of the work "is not 'available to the institution,'" or the work is not accessible because it is secured behind technological protection measures. AM. LIBRARY ASS'N, DISTANCE EDUCATION, *supra* note 45.

66. *Id.* (noting that "[a] narrow reading of these requirements may also raise questions about the use of copyrighted works in distance-education programs aimed at community service or continuing education.").

management systems such as Oncourse, Angel, WebCt; or Blackboard may be fruitfully employed to provide a means of distribution and display of copyrighted materials that comports with the mandates of the TEACH Act.⁶⁷ As noted by the American Library Association, “Blackboard courses provide a course context in which the role of the instructor and the instructor’s control over the materials are clearly defined.”⁶⁸ Course management systems prove relevant in the following contexts: as a vehicle for the selection of material to be displayed or performed; as a means to limit access to a select group of enrolled students and to control the availability of the work to enrolled students so that materials become unavailable upon the completion of the class session; as a way to convey college or university policies and information regarding copyright issues; as a means for the instructor to designate the copyright status of specific works; and as an overall mechanism for the instructor to exercise the type of oversight deemed requisite for the successful employment of the protections afforded by the TEACH Act.⁶⁹

Because the TEACH Act is so new and complex with many conditions imposed upon the college or university, its information technology staff, and its faculty, the Act’s boundaries have not been tested, and many institutions continue to instruct that professors must obtain licenses for any copyrighted materials used in their courses.⁷⁰ Others employ a strategy that relies on obtaining permission coupled with reliance on the fair use doctrine, which continues to remain a viable vehicle for the transmission of copyrighted materials in distance education. Thus far, it appears that the TEACH Act may be utilized as a potentially promising resource, presuming the college or university has complied with its mandates, to protect the institution should a faculty member err in his or her interpretation of the necessity for obtaining a license. Even with the TEACH Act, not all desired uses of copyrighted materials in distance education will be deemed permissible, and the

67. It should be noted that most course management systems will require the provider college or university to “make warranties and representations regarding their ownership or licensing of the content that is provided to them for distribution.” AM. COUNCIL ON EDUC., DEVELOPING A DISTANCE POLICY FOR 21ST CENTURY LEARNING (2000), available at <http://www.acenet.edu/am/printertemplate.cfm?section=search&template=/cm/htmldisplay.cfm&contentid=7819>. The materials placed on such systems satisfy copyright requisites if the instructor owns the copyright, has garnered permission from the copyright holder, has satisfied the fair use test with respect to the work, the material is in the public domain, or the copyrighted work falls within a statutory exception. COPYRIGHT MGMT. CTR., COURSE MANAGEMENT SYSTEMS AND COPYRIGHT AT IUPUI, <http://www.copyright.iupui.edu/distedcms.htm> (last visited Sept. 29, 2006).

68. AM. LIBRARY ASS’N, TEACH ACT BEST PRACTICES USING BLACKBOARD (2006), <http://www.ala.org/ala/washoff/WOissues/copyrightb/distanced/teachactbest.htm>.

69. *Id.*

70. Hutchinson, *supra* note 35, at 2224–34 delineates those external and internal factors that limit the usage of the TEACH Act by providers to include, among others: the Act only applies to accredited nonprofit colleges and universities; the majority of educators do not utilize the type of media whose use the TEACH Act was intended to promote; many educators are unaware of the legislation or its implications, or are dissuaded by its complexity; and educators are either not apprised of copyright law or are uncertain as to the practical applicability of terms such as “reasonable and limited” as applied to their implementation of copyrightable material in their distance courses. *See also* Simpson, *supra* note 59, at 24.

faculty member may be compelled to rely on fair use or seek permission from the copyright holder for uses that exceed the statutory limits.

V. OWNERSHIP ISSUES

The author/creator of copyrightable materials is indeed the holder and hence, owner, of the creative expression he or she has devised, and it is that person who is granted the exclusive rights delineated above. Traditionally, colleges and universities have deemed all copyrightable materials that a faculty member authors, which includes books and articles, and course content such as class lectures and class handouts, as the property of the faculty member (although Stanford asserts in its copyright policy that it is the owner of courses taught and courseware developed for teaching at Stanford).⁷¹ This tradition of allowing faculty to claim ownership of their work emanated from case law. It is not at all clear that the Copyright Act of 1976 adopts that tradition.⁷² Arguably, one could assert that the work achieved during one's course of employment and in congruence with expectations of the college belongs to the college. Nonetheless, many colleges and universities, including Richard Stockton College,⁷³ continue to give deference to faculty claims of ownership for "scholarly and aesthetic copyrighted works," including course content, in part because the colleges and universities have neither contributed substantial resources to the books and articles produced by faculty; nor have they specifically commissioned a particular work.⁷⁴

The ownership issue proves more complex when one considers its implications in online education. The substantial time demands placed upon faculty in creating and maintaining an online course, and potential economic rewards, prompt faculty to seek copyright ownership.⁷⁵ Yet in creating course content and particularly

71. OFFICE OF THE VICE PROVOST AND DEAN OF RESEARCH AND GRADUATE POLICY, STANFORD UNIV., RESEARCH POLICY HANDBOOK: COPYRIGHT POLICY, at § F, *available at* <http://www.stanford.edu/dept/DoR/rph/5-2.html> (last visited Sept. 29, 2006). In contrast, the copyright policy of the University of Michigan states that the University may claim ownership of faculty-created instructional materials or courseware, including online course materials, where "the University has specifically requested such materials and either invested unusual University resources in them . . . or specifically compensated faculty-creators" with additional measures such as added compensation or release time. THE REGENTS OF THE UNIV. OF MICH., UNIV. OF MICH., UNIVERSITY POLICIES: OWNERSHIP OF COPYRIGHTED WORKS CREATED AT OR IN AFFILIATION WITH THE UNIVERSITY OF MICHIGAN § C(1)(b), *available at* <http://www.copyright.umich.edu/official-policy.html> (last visited Sept. 29, 2006).

72. Courts have split on the issue of whether the Copyright Act of 1976 incorporated the teacher exception, with most concluding that it did not survive the codification. *See* GEORGIA HARPER, UNIV. OF TEX. SYS., COPYRIGHT LAW IN CYBERSPACE: SCENARIOS ADDRESSING OWNERSHIP, FAIR USE, VICARIOUS LIABILITY AND "CYBERSQUATTING" (TRADEMARKS), <http://www.utsystem.edu/ogc/intellectualproperty/cybrscen.htm> (last visited Sept. 29, 2006).

73. *See* AGREEMENT, STATE OF NEW JERSEY, *supra* note 17, at 93.

74. HARPER, *supra* note 72, opines that "online courses require so much more institutional investment than a textbook did that it is not clear at all that a teacher exception would be fair in this circumstance." *Id.*

75. Developing an online distance education course encompasses tasks that include: modifications to instructional strategies and assignments, the learning of a course management tool and software, and preparation of lectures with streamed video and audio. *See* Zelif, *supra*

courseware for distance education purposes, the efforts of many persons such as programmers and graphic designers are usually implicated.⁷⁶ Therefore, the potential exists that several parties may assert ownership claims with respect to the courseware requisite for online endeavors. Moreover, usually online courses require more substantial institutional involvement, including technical help afforded the professor, release time awarded to faculty who develop online courses, institutional funding or gifts directed to the creation of distance education, or contributions of other significant resources to facilitate the development of the course. Cornell, for example, exercises an equitable ownership interest in courseware which required the substantial use of a grant made to the university.⁷⁷ Thus, colleges and universities typically assert ownership rights to “copyrighted property” that is created with “more than incidental use of College/University facilities or financial support.”⁷⁸ Further, similar to other institutions, Richard Stockton College will be the sole owner of copyrightable materials if it commissions the work pursuant to a signed contract, specifically assigns an employee to create the work, or grants an alternate assignment within load accompanied by a writing indicating its intention to claim ownership of copyright to any work made possible by the alternate assignment.⁷⁹ Significantly, the

note 7, at 56.

76. Johnson, *supra* note 54, at 436.

77. See CORNELL UNIV. BD. OF TRS. EXECUTIVE COMM., CORNELL UNIV., CORNELL UNIVERSITY COPYRIGHT POLICY, available at http://www.policy.cornell.edu/cm_images/uploads/pol/Copyright.html (last visited Sept. 29, 2006); see also OFFICE OF THE VICE CHANCELLOR AND GEN. COUNSEL, UNIV. OF N.C. AT CHAPEL HILL, POLICIES AND PROCEDURES: COPYRIGHT POLICY (2001), available at <http://www.unc.edu/campus/policies/copyright.html>. The University of North Carolina at Chapel Hill’s policy articulates that exceptional use of University resources, which triggers University ownership of Traditional Works or Non-Directed Works, includes the following:

- (i) Waiver of fees normally required to use specialized facilities such as equipment, production facilities, service laboratories, specialized computing resources, and studios;
- (ii) Institutional funding or gifts in support of the work’s creation; and
- (iii) Reduction in levels of teaching, service or other typical university activities (e.g., course load, student advising responsibilities, division/department meetings, office hours, administrative responsibilities) specifically to facilitate creation of the work.

Id. at § V(A)(2)(a).

78. See AGREEMENT, STATE OF NEW JERSEY, *supra* note 17, at 94 (providing the most recent union contract for state colleges in New Jersey). Universities may also assert ownership claims of online courses as a vehicle to deter faculty from developing courses for competing institutions. See Michael W. Klein, “Sovereignty of Reason”: *An Approach to Sovereign Immunity and Copyright Ownership of Distance-Education Courses at Public Colleges and Universities*, 34 J.L. & EDUC. 199, 206–07 (April 2005) (discussing the instance wherein Harvard Law School Professor Arthur R. Miller developed several videotaped lectures for Concord University School of Law, purportedly the first online law school). In response to this perceived violation of Harvard’s prohibition against teaching at another institution without administrative approval, and notwithstanding Professor Miller’s protests that his conduct did not constitute “teaching,” the law school revised its faculty manual to require the dean’s permission before one serves as a teacher or consultant to an online university. *Id.* See also Johnson, *supra* note 54, at 434.

79. AGREEMENT, STATE OF NEW JERSEY, *supra* note 17, at 94.

Copyright Act of 1976 and subsequent amendments do not address the ownership of distance learning course content and courseware. Such determinations, therefore, must be made in accordance with existing institutional policies and contracts.⁸⁰

The American Council on Education suggests that an institution, when revising its intellectual property policies, consider the following ownership issues: (1) define author rights of ownership regarding the online distance education course, as impacted by collective bargaining agreements in state institutions, faculty policies and handbooks, and traditional or customary rights, including, among other issues, whether faculty may prepare course work for unaffiliated distance education providers;⁸¹ (2) clarify how the institution and the faculty will share in any royalties generated by distance education courses; (3) distinguish among distance courses that are created by a faculty's own initiative, versus those which are created under a contract with the institution or as a work for hire; and (4) where ownership is dependent upon the depth of the institutional commitment of time, resources, and technical help, clarify what constitutes the type of substantial university resources that would trigger institutional ownership.⁸²

VI. FORMALIZING COPYRIGHT

As noted earlier, ownership of copyrightable materials is asserted immediately upon the creation of the original, tangible expression of the work of art without the

80. Johnson, *supra* note 54, at 450, observes that many institutions seek to avoid ownership issues related to distance education by "publishing or producing the course materials as works for hire, assigning professors to create the work for additional compensation or release time." Works for hire under the Copyright Act of 1976, § 201, are those prepared by an employee within the scope of his or her employment, and thus are deemed the property of the employer. Pursuant to such classification coupled with the restraints imposed by an institution's copyright policy, faculty rights to copyright ownership of distance education courseware and course content may be limited.

81. This issue is likely to be addressed as well in the context of a college or university's conflict of interest policies wherein an institution requires that a professor seek approval from administration before assuming teaching responsibilities for another academic institution. A case on point is that of Harvard Law School Professor Arthur R. Miller, who in 1998 videotaped eleven lectures for a course on civil procedure to be offered by the Concord University School of Law, an online degree granting institution. Notified that he had violated Harvard policies barring faculty from teaching at another educational institution during the academic year without first securing the dean's permission, Professor Miller asserted that his activities did not constitute teaching in that he was not "giving" lectures at another institution. Expressing concern that others might view the tapes as reflective of Mr. Miller's joining the Concord faculty, Law School Dean Robert Clark requested that Mr. Miller terminate his contract with Concord. Subsequent to that event, the Law School amended its faculty manual to set forth a new rule stating that any faculty member who desires to serve as a teacher, consultant, or researcher for an Internet based university must first secure permission from the dean, and additionally, must have the conduct approved by a vote of the corporation that governs the University. Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein In One Of Its Star Professors—Arthur Miller Moonlighted Plenty on TV; the Web Is a Very Different Matter—“Any Student Can Have Him,”* WALL ST. J., Nov. 22, 1999, at A1; *see also* Klein, *supra* note 78 for a brief reference to the Miller case.

82. AM. COUNCIL ON EDUC., *supra* note 67.

necessities of any accompanying formalities. It is advisable to formalize one's copyright, however, for several reasons. Firstly, it offers additional evidence that one is indeed the holder of the copyright. Further, in order to obtain statutory damages for infringement of one's copyright as provided by the Copyright Act, which obviates the need for one to actually document the extent to which one was harmed by the infringement (lost profits), one's copyright must be formally registered with the Library of Congress, of which the Copyright Office is a division, at the time the infringement occurred. Statutory damages range from \$750 to \$30,000 for each infringing copy; if willful intent can be demonstrated on the part of the infringer, the court may increase statutory damages up to a total of \$150,000 for each infringement.⁸³ It should be noted that copyright infringement is a strict liability offense in that proving intent on the part of the infringing party is not a requisite to a finding of civil liability; demonstrating such intent is only deemed a prerequisite for the imposition of criminal liability.⁸⁴ The steps to formalizing one's copyright are rather straightforward and include the following: a copyright notice with date of publication should be affixed to the work, the author must register the copyright by completing the two page form and paying the nominal filing fee of \$45.00 with the Library of Congress, and the copyright holder should submit two copies of the work to the Library of Congress. The website of the U.S. Copyright Office⁸⁵ is very informative with respect to all issues pertinent to obtaining a copyright, including fees, forms and frequently raised questions.

VII. PUBLIC DOMAIN

Misconceptions are commonly held with respect to one's ability to copy, distribute, and display materials, such as photographs, that are available on the Internet. The assumption that a downloadable photograph, for example, is in the public domain and can be utilized in an online course as long as it is properly cited is not supportable. Nor can one assume that one is free to disseminate via hard

83. See 17 U.S.C. §§ 504(c)(1)–(c)(2) (2000).

84. In 1897 the first criminal provision under the copyright laws, initially a misdemeanor for unlawful performances and representations of copyrighted dramatic and musical compositions, required that the conduct of the defendant be "willful and for profit." Legislation in 1909 extended this penalty to all types of copyrighted works. Under the 1976 Copyright Act, criminal infringement remained a misdemeanor except for repeat offenders who were punishable by a maximum prison sentence of two years and a \$50,000 fine, but it changed the *mens rea* requirement to conduct "willfully and for purposes of commercial advantage or private financial gain." In 1982 the penalties were increased, with some first time offenders subject to felony punishment, subject to the time period involved and the number of copies reproduced or distributed. In 1992, Congress passed the Copyright Felony Act, which extended felony provisions to copyright infringement of all copyrighted work including computer software. Throughout all revisions, the requisite intent that the defendant act "willfully and for purpose of commercial advantage," remained the same. See generally Jonathan Rosenoer, *Copyright & Property, Criminal Copyright Infringement*, CYBERLAW (Jan. 1995), available at www.cyberlaw.com/cylw0195.html; see also U.S. DEPT. OF JUSTICE, FEDERAL PROSECUTION OF VIOLATIONS OF INTELLECTUAL PROPERTY RIGHTS, <http://www.usdoj.gov/criminal/cybercrime/CFAleghist.htm> (last visited Sept. 29, 2006).

85. See U.S. Copyright Office webpage, <http://www.copyright.gov/> (last visited Sept. 28, 2006).

copy or electronically textual or graphic work that is available to view, download, or print.⁸⁶ Simply stated, one cannot assume any material posted on the Internet is within the realm of public domain unless the author at the site expressly states that it can be copied without permission. As observed earlier, proper attribution of the photograph is not a viable defense to a copyright infringement claim filed by the copyright holder. Citing the author does not address the key issue that it is the copyright holder's ownership right to determine the manner in which his work may be distributed; nor does crediting an author address the issue of the market impact one's use may have on the owner's ability to profit from his copyrighted material. The fact that one can download a photograph, or print photographs or text from a site does not mean such works can be distributed to others or that they are unprotected. Many copyright holders of photographs and articles allow those items to be displayed on websites in order that others may benefit; however, this posting does not in any way indicate that the copyright holder has agreed or given permission that the material be used in a course. This publishing of the photograph on the Internet is legally indistinguishable from publishing in a more traditional format. In the same fashion as conventional publication, it can harm the commercial viability of the copyrighted work, particularly when it is offered to a vast audience which may be deterred from purchasing the original work. Moreover, pursuant to the Copyright Act of 1976, it is not necessary for the copyrighted work to bear a copyright notice; the copyright holder's rights with respect to control of distribution remain protected.

Other materials that do form what is known as public domain include the following: those whose copyright has expired,⁸⁷ work created by the federal government, and public documents of state and local governments. It is important to note that numerous sites exist on the web that claim to serve as databases of works such as photographs, music and novels that are in the public domain and can be copied without permission.⁸⁸ Most post warnings, however, that they convey no warranties with respect to whether the materials compiled at the site have properly complied with intellectual property laws such as copyright, and hence, one risks that materials on those sites may include copyrighted works to which the author has not agreed to convey copying rights.

VIII. ORPHAN WORKS

Particularly perplexing for those faculty who desire to advance the exposure of copyrighted works for teaching purposes, and for those authors who seek to utilize prior works as the foundation for new creative works is the dilemma that is

86. See SIMMONS COLL., SIMMONS COLLEGE INTRANET FOR CURRENT STUDENTS, FACULTY & STAFF, <http://my.simmons.edu/services/technology/policies/copyright.shtml> (last visited Sept. 28, 2006).

87. Peter B. Hirtle, *Recent Changes to the Copyright Law: Copyright Term Extension*, ARCHIVAL OUTLOOK, Jan./Feb. 1999, available at www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

88. See, e.g., Public Domain Images webpage, <http://www.pdimages.com> (last visited Sept. 28, 2006).

confronted with copyrighted works whose owners are difficult or impossible to locate, even where a good faith effort has been mounted to identify them. The use of such copyrighted works, deemed orphan works, is fraught with uncertainty and economic risk, as the potential liability of a copyright infringement lawsuit exists. For those third parties who have fostered the works, expending efforts to distribute, commercialize, preserve, or afford access to them, the specter of the copyright owner looming on the litigation horizon serves as a deterrent to constructive use of the orphan works. Recognizing the dilemma posed by orphan works, on January 26, 2005 the U.S. Copyright Office issued a Notice of Inquiry seeking advice as to whether compelling concerns raised by orphan works merited a legislative or regulatory solution.⁸⁹ Subsequent to that request, comments were filed addressing the orphan works problem⁹⁰ and roundtable discussions were held. On January 31, 2006 the U.S. Copyright Office submitted a report on orphan works to the Senate Judiciary Committee,⁹¹ and on May 22, 2006 Rep. Lamar Smith (R-TX), chair of the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property, introduced H.R. 5439, the "Orphan Works Act of 2006, which would amend the Copyright Act by adding a new section 514 entitled Limitation on remedies in cases involving orphan works."⁹²

89. AM. LIBRARY ASS'N, COPYRIGHT: ORPHAN WORKS (2006), <http://www.ala.org/ala/washoff/WOissues/copyright/orphanworks/orphanworks.htm> [hereinafter AM. LIBRARY ASS'N, ORPHAN WORKS].

90. For a typical type of commentary received by the U.S. Copyright Office, see CTR. FOR THE STUDY OF THE PUB. DOMAIN, DUKE LAW SCHOOL, ORPHAN WORKS: ANALYSIS AND PROPOSAL (2005), available at <http://www.law.duke.edu/cspd/pdf/cspdproposal.pdf>. Noting problems additional to those raised by the U.S. Copyright Office in its request for proposals, (which included that potential subsequent users of orphan works cannot afford the risk of potential liability and that orphan works cannot freely be made available to the public), the Duke report raised the following additional concerns: (1) the absence of formal copyright symbols, due to the fact copyright law no longer has formalities, confers no safe harbor even to a good faith user; even authors who do not seek protection are "swept . . . into the copyright scheme"; (2) given the nature of technology, more copyrighted works are created but through nonstandard distribution channels where record-keeping is sporadic, thus exacerbating the problem; (3) repeated retroactive copyright term extensions "mean that vast numbers of works whose authors had no reason to order their affairs in the belief that rights will subsist are still potentially under copyright," with many of those works now constituting orphan works; (4) given current technology many have the means to restore, edit, and revise orphan works, yet copyright law poses an unnecessary barrier to future dissemination; and (5) many modern media will not endure for the complete copyright term without the ability to preserve the orphan works. *Id.* The Duke Center for the Study of the Public Domain opines that "[t]he costs of an inadequate system of access to orphan works are huge: needlessly disintegrating films, prohibitive costs for libraries, incomplete, and spotted histories, thwarted scholarship, digital libraries put on hold, delays to publication." *Id.*

91. On March 8, 2006 the House Judiciary Committee held a hearing with respect to the Report, and on April 6, 2006 the Senate Judiciary Committee conducted its hearing. AM. LIBRARY ASS'N, ORPHAN WORKS, *supra* note 89.

92. *Id.* As of August 1, 2006 a companion bill had not yet been introduced in the Senate. For a link to the complete PDF file of H.R. 5439, see *Rep. Smith Introduces Orphan Works Act of 2006*, TECH. LAW J. (May 22, 2006), available at <http://www.techlawjournal.com/topstories/2006/20060522.asp> [hereinafter *Rep. Smith Introduces*].

To comport with the goal of the Copyright Office as enunciated in its Report of 2006, to facilitate “the productive and beneficial use of orphan works,”⁹³ the proposed legislation would limit remedies for copyright infringement of orphan works where the user has demonstrated a reasonably diligent,⁹⁴ good faith effort to locate the owner but is unable to do so. The copyright holder’s remedies for damages or injunctive relief are limited. “[A]n award for monetary relief (including actual damages, statutory damages, costs, and attorney’s fees) may not be made, other than an order requiring the infringer to pay reasonable compensation for the use of the infringed work.”⁹⁵ No damages are afforded the holder if the infringement is without commercial purpose and is primarily for a “charitable, religious, scholarly or educational purpose” and the infringer “ceases the infringement expeditiously after receiving notice of the claim for infringement.”⁹⁶ Among other limitations, the bill provides restrictions on injunctive relief where the infringer “recasts, transforms, adapts, or integrates the infringed work with the infringer’s original expression in a new work of authorship” if the infringer “pays reasonable compensation” to the holder for use of the infringed work and “provides attribution to the owner” in a manner deemed reasonable by the court under the circumstances.⁹⁷ While clearly the goal of the proposed legislation is to advance and preserve knowledge that heretofore has been shrouded in the constraints of orphan status, it has not been accorded universal commendation. Libraries, universities, and museums are avid supporters, as well as the music, movie, book, and software industries, but individual artists and authors in the fields of photography, illustration, and the visual arts voice strong opposition to the enactment of the Orphan Works Act of 2006.⁹⁸

93. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (Jan. 2006), *available at* <http://www.copyright.gov/orphan/orphan-report-full.pdf>. The Report further articulates two “overarching and related goals”: to “make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment, if appropriate, for the intended use of the work”; and “where the user cannot identify and locate the copyright owner after a reasonably diligent search, then the system should permit that specific user to make use of the work, subject to provisions that would resolve issues that might arise if the owner surfaces after the use has commenced.” *Id.* at 93, 94.

94. H.R. 5439 § 514 (a)(2)(B)(i)(I)–(III), 109th Cong., 2d Sess. (2006) (providing that a reasonably diligent search shall include steps that are “reasonable under the circumstances to locate that owner” and that minimally the steps shall include a review of the information maintained by the Register of Copyrights and that a reasonably diligent search includes “the use of reasonably available expert assistance and reasonably available technology, which may include, if reasonable under the circumstances, resources for which a charge or subscription fee is imposed.”).

95. *Id.* § 514(b)(1)(A).

96. *Id.* § 514(b)(1)(B)(I), (II).

97. *Id.* § 514(b)(2)(B).

98. *Rep. Smith Introduces, supra* note 92. Objectors to H.R. 5439 assert that the bill, unlike the current Copyright Act which imposes substantial statutory damages for infringement (on behalf of those holders who registered the expression prior to the infringement), by allowing only “reasonable compensation,” will not serve as a deterrent to potential infringers. And without the prospect of receiving attorney’s fees, the wronged party may not have sufficient resources to litigate in an instance where reasonable compensation is not offered. One copyright attorney

IX. LINKING TO ADVERTISED WEBSITES

Instructing students in a distance education course to view material on an advertised website via a hot link from a menu page in the online course does not constitute copyright infringement. Even deep linking, or sending the students to a page within the designated website rather than the home page should constitute no copyright problem. It should be noted, however, that some controversy may arise with respect to linking to an internal page of a website, and thus avoiding the paid advertising that may appear on the site's home page, leading the owner of the site and/or the advertisers to seek redress.⁹⁹ Another issue that does arise with such linkage is one of potential trademark infringement, as the college or university must exercise caution that in sending the student to another source it is not making it appear that the college or university and the site are affiliated or partnered in any fashion. You do not need permission to establish the link, but you cannot portray it as if that site is endorsing the distance education or the institution. Further, students can be instructed to view the site to see the facts, but they should be urged to refrain from copying the site. Most sites will post rules and regulations with which the user must comply, which are often embodied in electronic or "click wrap" licenses that should be reviewed by faculty to ensure the website's terms of use are acceptable for distance education purposes. A copyright policy issued by Richard Stockton College and other colleges and universities should state that if an online course contains such links, the best course of action is to first check with the site to see if the linkage is permissible according to the owner of the website, and whether it is acceptable to reproduce images located therein for educational purposes. One must also exercise caution in avoiding linkage with competitors, in this instance other colleges, which may not favorably view such an association.

X. SECURING PERMISSION TO USE COPYRIGHTED MATERIAL

Notwithstanding the fair use doctrine and the TEACH Act, some institutions persist in the belief that the safest way to integrate copyrighted materials into course offerings in the traditional classroom or in distance education, is to secure permission or licenses for the copyrighted works. New York University, School for Continuing and Professional Education, for example, has a policy of requiring licenses and utilizes the TEACH Act as a backup in the event a faculty member neglects to obtain a license.¹⁰⁰ Of course, this utilization of the TEACH Act as

urges that the bill is overly broad and should be limited to universities, museums, and libraries. See Megan E. Gray, *Primer on the Orphan Works Act of 2006: Why it is Bad for Artists, Designers and Photographers*, available at http://www.paintercreativity.com/articles/orphan_works_act.html (last visited Sept. 28, 2006).

⁹⁹ See TRINITY UNIV. INFO. TECH. SERVS., TRINITY UNIV., APPROPRIATE USE POLICY FOR STUDENTS: POLICY ON THE VIOLATION OF COPYRIGHT LAW USING UNIVERSITY RESOURCES, available at <http://www.trinity.edu/departments/its/policies/appropriateuse.asp> (last visited Sept. 28, 2006). Trinity University's Copyright Policy addresses "hyperlinking" between sites and notes "there is a general presumption of open access, by anyone, to any page that someone has posted on the Web." *Id.* The policy further notes that bypassing a site's opening page may raise objections on the part of the owner and advertisers. *Id.*

¹⁰⁰ Hutchinson, *supra* note 35, at 2234.

support can only be relied on if the institution has comported with the parameters of the statute and has the appropriate protective technology in place. Others rely on a combination of license, fair use and the TEACH Act for any copyrightable material a faculty member places in a course, particularly if the amount of the copyrighted material to be integrated into the course exceeds the scope of fair use guidelines. In the proposed online course, "Understanding September 11," which Professor David Emmons intends to offer under the auspices of Richard Stockton College, producer Jon Blair has orally consented to the use of excerpts from his documentary entitled "The Age of Terror" in the online course. It is strongly suggested that such consents if tendered orally be put in writing. Moreover, in this instance it would appear that Mr. Blair jointly owns the copyright or has licensed its distribution rights to the U.S. Discovery Channel. In that instance, the permission of the Discovery Channel would also have to be obtained, or the license to utilize the work would have to be purchased.

In the event teachers need to request permission to use copyrighted materials, the professor should approach the author/creator/copyright holder directly; the author's name may be listed on the copyright notice accompanying the work, or it may become evident through an online search. It should be remembered, however, that the copyright may be held by a variety of parties, depending upon whether rights of publication or film are held separately. Publishers often have websites that prescribe the appropriate path to obtaining consent. Further, permission services such as the Copyright Clearance Center¹⁰¹ will contact the copyright owner and aid faculty in securing permission from the owner for a permitted use. In many cases a request may engender consent to use for no fee, when that use is for educational purposes. Further, numerous licensing agencies exist in major areas of creative endeavors such as music (The Music Bridge LLC),¹⁰² movies (Motion Picture Licensing Corporation),¹⁰³ and photo collections.¹⁰⁴ These are either empowered to convey the permission pursuant to the license they hold to use the artistic creation, or they direct one to the appropriate artist from whom one must seek permission.¹⁰⁵

In a written request submitted directly to the copyright owner, the letter should fully describe the material sought to be used, describe in detail the manner in which it will be employed (in class, online education, or for commercialization), the length of time for which it will be used, the audience for the course (for example, regarding the "Understanding September 11" online course, shall it be limited to Richard Stockton College students only, or is it to be made accessible to a broader group), and the technological protections in place with respect to limiting access, copying, and transmitting. When the faculty approach the publishers or

101. Copyright Clearance Center webpage, <http://www.copyright.com> (last visited Sept. 28, 2006).

102. The Music Bridge webpage, <http://themusicbridge.com> (last visited Sept. 28, 2006).

103. Motion Picture Licensing Corp. webpage, <http://www.mplc.com> (last visited Sept. 28, 2006).

104. *See, e.g.*, Altavista webpage, <http://www.altavista.com/image> (last visited Sept. 28, 2006).

105. *See supra* notes 102–104.

authors directly, they must allow sufficient time for the request to be processed, and it is advisable to maintain records of all correspondence exchanged in pursuit of the consent.

XI. FEDERAL EXEMPTION FOR STATE COLLEGES/UNIVERSITIES FROM COPYRIGHT INFRINGEMENT

There presently exists, pursuant to four U.S. Supreme Court decisions in the 1990s, substantial uncertainty as to whether public colleges and universities are subject to infringement actions due to the exemption afforded them by virtue of the sovereign immunity encompassed in the Eleventh Amendment to the Constitution.¹⁰⁶ The very state colleges and universities which profit immeasurably via the copyrights awarded their works of original expression, arguably, unlike their private college and university counterparts, can infringe the copyrights, patents, and trademarks of others with impunity. The Register of Copyrights in a 2000 presentation before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary observed that until the quartet of rulings the law of sovereign immunity had never before been used to exempt states from any of the remedies available under the Copyright Act.¹⁰⁷ Deeming the current situation “unjust and unacceptable,” the Register urged Congress to use its tools “to prevent the successful assertion of state sovereign immunity where it has become a tool of injustice.”¹⁰⁸ And commencing in 1999, legislative efforts, particularly on the part of Sen. Patrick Leahy, have been introduced to prevent states from recovering damages for infringement of state owned property unless they first waive their Eleventh Amendment sovereign immunity from suits against them for their infringement of the intellectual property rights of others.¹⁰⁹

106. See *Alden v. Maine*, 527 U.S. 706 (1999) (barring a Fair Labor Standards Act lawsuit against Maine due to the sovereign immunity which the state enjoys); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act of which the purpose was to abrogate state immunity for patent infringements); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (invalidating the Trademark Remedy Clarification Act); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (ruling that Congress lacked the authority under Article I of the Constitution to abrogate the States’ Eleventh Amendment sovereign immunity from suit in federal courts under the Indian Gaming Regulatory Act). The Register of Copyrights noted that “[f]or most of our history, it has been assumed that the States enjoyed no special immunity from suits for infringement of intellectual property rights, but in the past fifteen years those assumptions have been called into question. . . .” Marybeth Peters, Statement, *The Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary: State Sovereign Immunity and Protection of Intellectual Property*, July 27, 2000, available at <http://www.copyright.gov/docs/regstat72700.html>. It is interesting to note that the above noted Supreme Court decisions reflect a series of 5-4 opinions with rather vehement dissents.

107. Peters, *supra* note 106.

108. *Id.*

109. In 1999 Sen. Patrick Leahy introduced S. 1835, the Intellectual Property Protection Restoration Act (IPPPRA) which conditioned states’ exercise of federal intellectual property rights on a waiver of sovereign immunity for those infringement lawsuits brought against them as infringers. In 2001 Rep. Howard Coble and Rep. Howard Berman introduced H.R. 3204, the

The U.S. Supreme Court cases which “breathed new life into the doctrine of sovereign immunity,”¹¹⁰ incurring the displeasure of the U.S. Copyright Office, the software industry, the American Bar Association, and Congress, commenced with *Seminole Tribe of Florida v. Florida*¹¹¹ which involved a lawsuit premised on the Indian Gaming Regulatory Act (which was adopted pursuant to Article I, Section 8 authority) wherein the tribe sought to compel the state to bargain in good faith with them. The two prominent issues noted by the Supreme Court were: did Congress unequivocally express its intent to abrogate state immunity, and if so, did it do so pursuant to legitimate constitutional authority? The Court concluded Congress lacked constitutional authority under Article I to abrogate state immunity and that the source of such abrogation must be found in the Fourteenth Amendment, which subjects laws to a “much higher level of scrutiny.”¹¹² The trio of cases decided by the Court in 1999¹¹³ adhered to the standard enunciated in *Seminole* that Congress can only abrogate a state’s sovereign immunity within the context of the enforcement power of Section 5 of the Fourteenth Amendment.

In 1990 Congress amended the Copyright Act by enacting the Copyright Remedy Clarification Act (“CRCA”)¹¹⁴ and in 1992, the Trademark Remedy Clarification Act¹¹⁵ and the Patent and Plant Variety Protection Remedy Clarification Act,¹¹⁶ all of which emanated from Article I authority and which sought to make clear that Congress intended to abrogate state sovereign immunity with respect to state infringement of intellectual property rights and hold states

IPPRA of 2001, with Sen. Leahy introducing the companion bill in the Senate. Rep. Berman stated “I believe it is a serious inequity to allow a State to sue infringers of its intellectual property rights when the State itself can infringe the rights of others with impunity.” Tech Law Journal Daily E-Mail Alert, <http://www.techlawjournal.com/alert/2001/11.06.asp> (last visited Sept. 6, 2006). Sen. Leahy and Sen. Sam Brownback introduced S. 2031, the IPPRA of 2002, whose purpose Leahy stated, was to close a “huge loophole in our Federal intellectual property laws.” Tech Law Journal Daily E-Mail Alert, <http://www.techlawjournal.com/alert/2002/03/22.asp> (last visited Sept. 6, 2006). And in 2003 the IPPRA was reintroduced (S. 1191 and H.R. 2344) by Sen. Leahy, Rep. Lamar Smith, and Rep. Berman to address the “unfair commercial advantage that States and their instrumentalities now hold in the Federal intellectual property system. . . .” It would again require States to waive their Eleventh Amendment immunity before recovering damages for infringement of state owned intellectual property and it would provide for the abrogation of state sovereign immunity if that state violates intellectual property rights of others in a manner violative of the Due Process clause of the Fourteenth Amendment or the Takings Clause under the Fifth Amendment. Tech Law Journal Daily E-Mail Alert, <http://www.techlawjournal.com/alert/2003/06/13.asp> (last visited Sept. 6, 2006).

110. Peters, *supra* note 106. For a comprehensive history of the Eleventh Amendment, see Klein, *supra* note 78, at 209.

111. *Seminole Tribe of Fla.*, 517 U.S. 44; *see supra* note 106.

112. Peters, *supra* note 106.

113. *Supra* note 106.

114. Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (codified as amended in scattered sections of 17 U.S.C.).

115. Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (codified as amended in scattered sections of 15 U.S.C.).

116. Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (codified as amended in scattered sections of 7 and 35 U.S.C.).

liable for copyright infringement. While the U.S. Supreme Court has not yet addressed the constitutionality of the CRCA, it is significant to note that the Fifth Circuit Court of Appeals in *Chavez v. Arte Publico Press*,¹¹⁷ utilizing the standards articulated in *Seminole* and its progeny, held that the University of Houston, a state institution, could successfully assert sovereign immunity under the Eleventh Amendment as a compelling defense to a copyright infringement lawsuit brought in federal court pursuant to CRCA, that addresses uncompensated copyright violations by states. Chavez, the author of a book, had argued that the university through its Arte Publico Press had published unauthorized copies of her work and she sued for both injunctive relief and monetary damages. The Fifth Circuit premised its denial of Chavez' claim on its construction of the CRCA as an improper exercise of congressional legislative power.¹¹⁸

Assuming the Third Circuit Court of Appeals, in the instance of Richard Stockton College, concurs with the statutory interpretation offered by the Fifth Circuit, or that the U.S. Supreme Court upholds *Chavez*, the fact remains that this decision does not render copyright law moot as applicable to the College or any other state college or university as other remedies remain available to redress state violations of federal law. Moreover, two recent U.S. Supreme Court decisions in 2004 and 2006 suggest a retreat from the stance taken in *Seminole* regarding sovereign immunity of the states.¹¹⁹ Thus, even if Richard Stockton College or any other state college or university is sheltered from a copyright suit for damages in federal court, remedies are still available to a copyright holder plaintiff that would ensure states' compliance with federal law. Perhaps the most viable of these remedies is the fact that copyright holders may pursue injunctive relief against a college or university's officers. A state college or university officer still can be sued in his or her official capacity in federal court for injunctive relief to ensure the officer's conduct complies with federal law,¹²⁰ premised on the notion that when a state official violates federal law, he is acting beyond the scope of his duties and sheds the garb of state sovereign immunity.¹²¹ But, as observed by

117. 204 F.3d 601 (5th Cir. 2000).

118. *See id.* at 607. It is significant to note that the court, in analyzing the constitutionality of the CRCA, stated that there was no indication on the record that Congress, in enacting this legislation, was responding to "wholesale" copyright violations by the states, nor that Congress had considered whether sufficiently viable state remedies for this type of infringement existed, nor was there evidence that states intentionally infringe copyrights. *See id.* at 605-07. Thus, the record did not provide evidence of the type of "massive constitutional violations that have prompted proper remedial legislation" pursuant to the Due Process clause of the Fourteenth Amendment. *See id.* at 607.

119. *See Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990 (2006); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

120. *See Ex parte Young*, 209 U.S. 123 (1908). In this case, the Supreme Court created an exception to the doctrine of sovereign immunity by permitting federal lawsuits against state officials in their official capacity, where the state official has endeavored to enforce an unconstitutional law. In these instances, a plaintiff may seek injunctive relief compelling the state officer to adhere to federal law. Significantly, this remedy affords no monetary compensation to a copyright holder who has sustained losses due to infringement by the state. *See Klein, supra* note 78, at 240.

121. *See Peters, supra* note 106.

commentators, states would still be immune from monetary liability.¹²² Further, as noted by the U.S. Supreme Court in *Seminole*, the federal government could sue states in federal court to enforce copyright laws.¹²³ Additionally, Richard Stockton College employees and employees of other state colleges or universities could be sued individually for copyright infringement for monetary damages and/or injunctive relief in federal court. For in these instances individual resources and not those of the state would be at risk, and thus no Eleventh Amendment immunity would be obtained.¹²⁴ This would be particularly true in a case where the employee exercised “bad faith” in egregiously violating the tenets of fair use or the parameters of the TEACH Act. Some commentators have suggested that suits related to copyright infringements potentially may be heard in state courts if premised upon a cause of action grounded in the Fifth Amendment’s Takings Clause, where one would argue that the copyright infringement caused sufficient economic harm to constitute a taking.¹²⁵ Hence, one would sue state colleges or universities in state courts for the claims of takings of intellectual property rights.¹²⁶

Moreover, ultimately Congress could confer jurisdiction on state courts to enforce copyright law, enact new legislation to condition the exercise of states’ rights to copyright protection on their waiver of sovereign immunity, or the U.S. Supreme Court could overrule *Chavez*. The two recent Supreme Court cases suggestive of a potential limiting of the sovereign immunity doctrine articulated in *Seminole* are *Tennessee Student Assistance Corp. v. Hood* and *Central Virginia Community College v. Katz*.¹²⁷ In *Tennessee*, the Court held sovereign immunity would not bar a debtor’s lawsuit in federal bankruptcy court which sought a hardship discharge of a student loan debt. And on January 23, 2006, the Court in *Central Community College*, in a 5-4 decision, upheld a Congressional abrogation of state sovereign immunity in the context of bankruptcy. When Bernard Katz, the liquidating supervisor of the bankrupt Wallace’s Bookstores, sought to recover preferential transfers made by the bookstores to four state colleges and to collect monies owed by the colleges, the institutions moved to dismiss the lawsuit, premised upon sovereign immunity. It is yet to be determined whether this holding will be extended to intellectual property suits, thus rendering state institutions unable to thwart infringement lawsuits through the vehicle of sovereign immunity. Therefore, for all of the foregoing reasons, it is still essential that all members of the Richard Stockton College community, and that of other state colleges and universities, be apprised of copyright law as expressed in a college copyright

122. See *supra* note 120.

123. *Seminole Tribe of Fla.*, 517 U.S. at 71 n.14.

124. See Klein, *supra* note 78, at 241 (citing Daniel Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1336 (2001)). Professor Meltzer observes that the best option available for wronged copyright holders is “to sue the responsible state officials for damages to be paid out of their personal resources.” *Id.*

125. Klein, *supra* note 78, at 243 (citing Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 CAL. L. REV. 1161, 1163 n.5 (2000)).

126. See *id.*

127. *Katz*, 126 S. Ct. at 990; *Hood*, 541 U.S. at 440.

policy and strive in good faith to observe its mandates.

XII. SEVEN QUERIES AND SHORT RESPONSES

The questions submitted in Professor David Emmons's memorandum regarding the copyright issues surrounding his proposed online distance course entitled "Understanding September 11," to be offered under the auspices of Richard Stockton College, and the corresponding responses to those queries are set forth below.

1) Can the course be copyrighted? By whom? And is copyright equivalent to owning the property?

Answer: The definition of copyrightable works under the Copyright Act of 1976 has been amplified to include the course content and the courseware used in online education. Course content would consist of a professor's lecture notes, power point presentation and handouts. Courseware includes the technology used to present the course content in distance education. Such copyright can be obtained by the owner or copyright holder of the material, who in the case of course content would in all likelihood be the professor. The issue of ownership and consequently who can copyright the courseware is more complex, and is dependent on a number of factors including the nature of the participants who created the course and whether the college's involvement was deemed more than incidental.

2) Under what circumstances can one merely give proper attribution of the material without getting specific permission to use it?

Answer: Under no circumstances is attribution alone regarded as sufficient to defeat a claim of copyright infringement. Such attribution affords one a defense against charges of plagiarism, but is ineffective with respect to copyright. In order to avoid copyright infringement charges, one must satisfy the requisites of the fair use doctrine enunciated in the Copyright Act of 1976 as applied to face-to-face traditional teaching in a classroom or as embodied in the Technology Education and Copyright Harmonization Act of 2002 (TEACH Act) with respect to distance education that occurs at any location. Each use of copyrighted material whether in class or online must be examined pursuant to the four points test of fair use described above, although the scrutiny of fair use in the context of distance education is more rigorous, given the possibilities for transmission of copyrighted materials to websites and to users other than students registered for a course. In addition, the TEACH Act may afford some protection from infringement allegations if fair use is not met, but the statute is so new and so unexplored as of yet, that there exists little guidance in this matter. Further, the TEACH Act imposes substantial obligations upon the educational institution that seeks to benefit from its permitted uses of copyrighted materials. If neither fair use mandates nor the TEACH Act requisites can be satisfied, one is compelled to seek permission to

use the copyrighted material in order to avoid potential copyright infringement liability.

3) Is the external marketing of the course through an online virtual university a commercial venture, thereby changing the rules about use and copyright of material?

Answer: The doctrine of fair use contained within the Copyright Act of 1976 with respect to a faculty member's ability to utilize copyrighted works in traditional face-to-face nonprofit educational endeavors and as extended to nonprofit distance education institutions by virtue of the TEACH Act, is predicated on the premise that the use is for nonprofit educational purposes. Copies used in education (the external marketing of the online course constitutes further copying of the copyrighted materials contained therein) whose purpose is both educational and generating profit for the college, may not be viewed with favor. Once the elements of commercial prospects and anticipated revenue enter the picture, the doctrine of fair use is markedly impacted. Once the use is transformed from nonprofit educational purposes to that of commercial purposes, the application of fair use is arguably nullified.

4) Can one assume a downloadable photograph on the Internet emanating from a website can be used in the course without permission so long as it is properly cited?

Answer: No, one cannot make the assumption that any materials on the Internet are in the public domain unless that statement is expressly made and permission to use the material is expressly given. Even the websites which purport to gather photographs in the public domain for one's use may, in fact, contain copyrighted material which has been placed there either through negligence or fraud. One is accorded no warranties with regard to whether the compiled materials comply with copyright law, and hence, one uses them at risk.

5) Can excerpted material from a documentary be used without permission if it is properly cited? If the author has orally consented to such use?

Answer: Again, attribution will not satisfy the requisites of copyright law, for it still does not attest to whether the fair use test has been satisfied, nor does it alternatively, secure the permission of the author to its use. If the author/copyright holder has orally consented, that is sufficient if it can be proven, but it is suggested that such consent be obtained in writing. However, if the author of the documentary one wishes to include in the distance course has conveyed distribution rights to another party, such as the U.S. Discovery Channel in this instance, permission must be obtained from that party as well or licensing fees must be paid.

6) If the course contains a hot link from the WebCt platform to an advertised site on the Internet that is publicly accessible, may I assume

that material does not require permission to use?

Answer: Providing linkages for students to view material on an advertised website through a hot link on the online course's website does not constitute copyright infringement. It is wise, however, to check with the site to ascertain if the linkage is acceptable. Further, one must be wary of creating any appearance that the site is partnered with the college or is in any way endorsing the distance education, for issues of trademark infringement could arise.

7) What permissions are needed to use materials in the course that were authored or created by others? And how does one seek permissions where they are required?

Answer: If the use of the copyrighted materials exceeds that permitted under fair use, or does not satisfy the mandates of the TEACH Act with regard to distance education, then one must seek written permission directly from the copyright holder who might be the author, the publisher or another party, to permit its intended use. That request should fully detail the copyrighted material, its intended use and length of time for such use, its audience, and the technological protections in place designed to protect against unwarranted duplication and distribution of the material. One may also utilize the services of licensing agencies and permission services in order to obtain permission to use the copyrighted material.

XIII. CONCLUSIONS AND RECOMMENDATIONS

Copyright law as embodied in the Copyright Act of 1976 and its subsequent amendment, the Teaching Education and Copyright Harmonization Act of 2002 (TEACH Act) provide a complex arena within which colleges and universities must operate. Whether one seeks to integrate copyrightable materials into the traditional face-to-face classroom, the hybrid or blended course, or employ the intellectual property of others in online distance education, the parameters of these statutes must be understood and communicated to faculty and students. Notwithstanding the potential immunity afforded state institutions from a copyright infringement lawsuit seeking damages in a federal court, should the U.S. Supreme Court uphold the Fifth Circuit Court of Appeals *Chavez* decision, the college and its members remain vulnerable to other legal remedies that may be pursued by a copyright holder seeking to ensure a college or university's compliance with the federal copyright statutes.¹²⁸

Prior to online education, one's comprehension of the statutory scheme was essentially limited to the teacher's exemption and fair use doctrine established in the Copyright Act of 1976. Yet even in the traditional classroom, misconceptions regarding fair use abound; the notion that every educational use constitutes fair use is not supportable. Each faculty should be apprised of the four points fair use test,

128. See *Chavez*, 204 F.3d at 601.

assess each piece of copyrighted material in light of that test, and make a good faith decision as to whether fair use will support the copying or integration of articles, video, and music into the traditional classroom and into distance education, or whether permission must be sought. As the Copyright Act did not extend the fair use doctrine to online education, Congress sought to rectify that imbalance with the implementation of the TEACH Act. It ideally affords the distance educator similar rights to utilize copyrighted material as those enjoyed by the faculty in a traditional classroom.

The TEACH Act, however, requires much more responsibility on the part of the college or university than does fair use. The college or university, among other duties, must implement a broad-based copyright policy and transmit that policy to all relevant constituents of the college or university; technological measures that limit access, retention, and dissemination of the copyrighted material must be employed; students must be notified in each use of distance education that copyrighted materials are included in the online course; and no interference can occur with the technological measures adopted by copyright owners to prevent retention and distribution of their works. Further, duties are imposed upon the individual faculty member to ensure that the tenets of the TEACH Act are upheld. The TEACH Act mandates, among other responsibilities, instructor oversight in distance education that includes ensuring only works explicitly allowed by the statute are utilized, that works are available for limited time periods relevant to a class session, and that materials are stored on a secure server. Moreover, research suggests few colleges or universities seek to rely on or understand the complexities of this statute, preferring to maintain a strategy of fair use and obtaining permission, with the TEACH Act used solely as a support mechanism should the faculty err in concluding his or her use comported with fair use standards.

The TEACH Act does expand the distance educator's rights to utilize copyrighted materials in a manner similar to that enjoyed in the traditional classroom. While it sets forth limitations on that right insofar as only more "reasonable and limited" portions of the dramatic literary and musical copyrighted works may be used, imposes more obligations upon the college or university and professor, and excludes certain works from its coverage, it will afford the professor the right to show performances of nondramatic literary or musical works, portions of dramatic works such as movies and music, and display works such as artwork in amounts comparable to traditional face-to-face classrooms. It is important to note that fair use considerations will still be relevant even in the context of the TEACH Act and distance education.

Therefore, it is suggested that all colleges and universities, including Richard Stockton College, establish a broad-ranging comprehensive copyright policy that will extend beyond the typical contractual conclusions regarding ownership of copyrightable material, as currently embodied, in the case of Richard Stockton College, in the Agreement between the State of New Jersey and the Council of New Jersey State College Locals for the period of July 1, 2003 to June 30, 2007. Many colleges and universities, in a fashion similar to that of Richard Stockton College, adhere to copyright policies which only address ownership issues of copyrightable materials; others solely address the nuances of the fair use doctrine.

Other universities, such as Columbia University and the University of Texas, have constructed policies which endeavor to address a broad scope of related copyright issues.¹²⁹ It is important that all institutions of higher learning follow the more comprehensive path for the following reasons: (1) One primary requisite of the TEACH Act is that the college or university, in order to avail itself of its benefits, must have implemented a thorough copyright policy which it communicates to all parties on campus; (2) Were a college or university or its faculty to be sued for copyright infringement, a viable defense mechanism termed “good faith fair use defense” wherein one asserts that one reasonably believed that what they did was a fair use,¹³⁰ would prove more credible if the individual could genuinely assert that he or she was adhering to the college or university’s existing copyright fair use policy; and (3) Adopting such an inclusive policy would demonstrate to the entire college or university that for both ethical and legal reasons, copyright law should be accorded the highest priority.

An all encompassing copyright policy which would address the nuances of intellectual property issues relevant to colleges and universities, particularly for the large research institutions, is beyond the scope of this article. And while the recommendations set forth below reference the guidelines of various institutions of higher education in an attempt to assure that suggestions made are consistent with the “industry standards” reflected in those documents, it is very clear that the TEACH Act affords an institution broad discretion to fashion a copyright policy that is compatible with its mission. The primary thrust of the TEACH Act is that the college or university demonstrate through its copyright policy an intent for all of its members to comport with the mandates of copyright law, and to be educated with respect to rights and responsibilities arising from the Copyright Act of 1976 and its amendments, to establish guidelines concerning frequently encountered issues such as fair use in the traditional classroom and through distance education technologies, and to clarify the requirements imposed by the TEACH Act. Therefore, the following suggestions are intended to serve solely as a framework of issues for individual institutions to consider as they develop their own copyright policies.

A. Standing Committee for Copyright Policy

It is advisable that a standing, rather than an ad hoc, committee be established whose initial mission would be to create a comprehensive copyright policy.¹³¹

129. See COLUM. UNIV. COPYRIGHT POLICY, *supra* note 26; UNIV. OF TEX. SYS., COMPREHENSIVE COPYRIGHT POLICY, <http://www.utsystem.edu/OGC/intellectualProperty/cprtpol.htm> (last visited Sept. 6, 2006).

130. UNIV. OF TEX. SYS., FAIR USE OF COPYRIGHTED MATERIALS: WHAT IS FAIR USE?, <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm> (last visited Sept. 29, 2006); see 17 U.S.C. § 504(c)(2), amended by 17 U.S.C.A. § 504(c)(3)(C) (West 2006) (effective Dec. 23, 2004). A successful application of this defense would permit court discretion to refuse to award any damages even if the copying exceeded the boundaries of fair use.

131. See INTELLECTUAL PROP. TASK FORCE, ASS’N OF AM. UNIVS., INTELLECTUAL PROPERTY AND NEW MEDIA TECHNOLOGIES: A FRAMEWORK FOR POLICY DEVELOPMENT AT AAU INSTITUTIONS (1999), available at <http://www.aau.edu/reports/IPReport.html> [hereinafter

Other responsibilities for this committee would entail systematically reviewing the policy every three or four years, rewriting the policy when deemed necessary and adjudicating disputes that arise under its formulated policy, such as ownership disputes and copyright infringement claims.¹³² Given the complexity of copyright law and the nature of the disputes and/or violations over which the committee would preside, it is suggested that it is preferable that it be comprised of seasoned veterans who have developed some familiarity and expertise with the intellectual property issues that must be addressed.¹³³ Such a committee, it is recommended by the Association of American Universities, should be appointed by the President or Provost and include members of the faculty who would consult with an officer of the university designated to oversee compliance with the intellectual property policy.¹³⁴ The members of the Regents Copyright Committee at the University of Georgia, for example, include the Assistant Vice Chancellor for Instructional Technology, the Associate Provost for Information Systems and Technology, the Assistant Vice Chancellor for Legal Affairs, the Dean and Director of Libraries, the Deputy Chief Legal Advisor, a Professor of Law, the Associate Provost for Faculty Relations, and the University Librarian.¹³⁵ Another model of copyright committee membership, proffered by the *Distance Education Report*, appears highly consistent with the goals of the TEACH Act, and includes: “an instructional designer, a distance ed administrator, a faculty member, a librarian who specializes in copyright law, and a technology director.”¹³⁶

ASS'N OF AM. UNIVS., INTELLECTUAL PROPERTY] (recommending the formation of standing committees at member colleges and universities).

132. See COLUM. UNIV. COPYRIGHT POLICY, *supra* note 26, at § II(F) (indicating the Copyright Policy Standing Committee will interpret the policy and resolve disputes concerning ownership of works and what constitutes substantial use of University resources); see also UNIV. OF N.C. COPYRIGHT POLICY, *supra* note 77, at § III(B)(1) (stating that the duties of its Copyright Committee include monitoring trends in “copyright use policies, changes in copyright ownership models, and guidelines for fair use of information in all formats.”); GEORGE MASON UNIV., UNIVERSITY POLICIES: UNIVERSITY POLICY NUMBER 1104, at § IV, *available at* <http://www.gmu.edu/facstaff/policy/newpolicy/1104gen.html> (last visited Sept. 29, 2006) (stating that the Computer Security Review Panel is responsible for interpreting the Responsible Use of Computing Policy and for consulting with the Copyright Officer—who is charged with administering the policy, interpreting it as applied to claims of alleged copyright infringement and periodically reviewing the policy—to resolve cases involving the use of University resources for unauthorized use of copyrighted works).

133. See REGENTS OF THE UNIV. OF CAL., UNIV. OF CAL., U.C. COPYRIGHT: 2003 POLICY ON OWNERSHIP OF COURSE MATERIALS, *available at* <http://www.universityofcalifornia.edu/copyright/systemwide/pocmdiv.html> (last visited Sept. 29, 2006) (suggesting the purpose of the Standing Committee is to provide consistency in the interpretation of the Policy).

134. ASS'N OF AM. UNIVS., INTELLECTUAL PROPERTY, *supra* note 131.

135. OFFICE OF LEGAL AFFAIRS, UNIV. SYS. OF GA., REGENTS GUIDE TO UNDERSTANDING COPYRIGHT & EDUCATIONAL FAIR USE, *available at* <http://www.usg.edu/legal/copyright> (last visited Sept. 29, 2006).

136. Susan Gaide, *TEACH Act Update*, 9 DISTANCE EDUCATION REPORT 1, 6 (Jan. 1, 2005).

B. Compliance Statement

The Association of American Universities suggests that policies that are formulated or amended to focus on intellectual property related to new information technologies, or new media, should begin by restating and reaffirming the core mission of the institution.¹³⁷ The University of North Carolina at Chapel Hill, for instance, indicates in its "Introduction to its Copyright Policy" that the University is "dedicated to instruction, research, and providing service to the people of North Carolina" and that it is the policy of the University to encourage "scholarly work in an open and free atmosphere To those ends, and in order to effect provisions of the Copyright Use and Ownership Policy of the University of North Carolina, this Copyright Policy is adopted."¹³⁸ George Mason University affirms its commitment to both its mission and copyright law as set forth in its "Policy Statement" that "[i]n recognition of its mission to further teaching, learning and research and engage in public service, the University is committed to fostering an environment that provides for the fair use of copyrighted works to achieve these goals while remaining in compliance with applicable law."¹³⁹ The compliance statement can be effectively communicated in a variety of ways: a straightforward statement of intent to comply with all copyright laws,¹⁴⁰ a similarly clear cut statement which is enhanced by links to the U.S. Copyright Office's Home Page,¹⁴¹ a lengthy policy statement incorporating Constitutional references and the balance that must exist between copyright holders and society's need for such copyrighted works to advance learning,¹⁴² or one that references fair use issues, securing permissions to use copyrighted materials, and management of the institution's copyrights.¹⁴³

137. ASS'N OF AM. UNIVS., INTELLECTUAL PROPERTY, *supra* note 131.

138. *See* UNIV. OF N.C. COPYRIGHT POLICY, *supra* note 77, at § I.

139. GEO. MASON UNIV. POLICIES, *supra* note 132, at § II; *see* TRINITY UNIV. COPYRIGHT POLICY, *supra* note 53 (including a compliance statement as articulated in the "General Statement of its Copyright Policy").

140. *See, e.g.*, CARNEGIE MELLON UNIV., COPYRIGHT POLICY OF CARNEGIE MELLON UNIVERSITY: POLICY STATEMENT AND REGULATORY COMPLIANCE, *available at* <http://www.cmu.edu/policies/documents/Copyright.html> (last visited Sept. 29, 2006) (stating "[i]t is the policy of Carnegie Mellon University that all members of the university community must comply with U.S. Copyright Law"); *see also* BROWN UNIVERSITY, COPYRIGHT AND FAIR USE, *available at* <http://www.brown.edu/Administration/Copyright/> (last visited Sept. 29, 2006).

141. *See, e.g.*, BOARD OF REGENTS OF WASHINGTON STATE UNIV., WASHINGTON STATE UNIV., COPYRIGHT POLICY, *available at* <http://www.wsu.edu/Copyright.html> (last visited Sept. 29, 2006) (noting that "WSU requires all users of campus Internet services to comply with all state and federal laws including copyright laws," and presenting links to the U.S. Copyright Office webpage); *see also* GEORGETOWN UNIV., COPYRIGHT INFORMATION PAGE, *available at* <http://www.georgetown.edu/home/copyright.html> (last visited Sept. 29, 2006) (linking to the "U.T. System Crash Course in Copyright" webpage and to the U.S. Copyright Office webpage).

142. *See* UNIV. SYS. OF GA. GUIDE TO UNDERSTANDING COPYRIGHT, *supra* note 135.

143. *See* UNIV. OF TEX. SYS., THE U.T. SYSTEM COMPREHENSIVE COPYRIGHT POLICY, <http://www.utsystem.edu/OGC/IntellectualProperty/cprtpol.htm> (last visited Sept. 29, 2006).

C. Fair Use Doctrine

So inextricably intertwined is the notion of fair use with copyright law, particularly as applied to the traditional classroom, as well as its online distance education counterpart, that it is essential that a copyright policy set forth the responsibilities of the faculty, staff, and students to become more fully apprised about copyright protections and the fair use doctrine. To that end, the policy should define the means by which the institution shall provide the vehicle for such education, whether in the form of printed materials,¹⁴⁴ workshops, or interactive tutorials.¹⁴⁵ Some policies choose to present the “Four Factors for Fair Use” test¹⁴⁶ accompanied by explanations; the most effective presentations of the fair use test are those which provide cases or scenarios that endeavor to translate the nebulous four point test into more readily comprehensible concrete terms. Thus, Indiana University-Purdue University-Indianapolis provides “Classroom Handout Common Scenarios”¹⁴⁷ and Carnegie Mellon presents examples which it labels “Cases.”¹⁴⁸ The University of Georgia affords the members of its community numerous examples of the application of fair use through scenarios provided in the context of research and writing, printed material, as journal articles for classroom use, and as copyrighted articles posted to a web page, video and sound recordings, multimedia projects, and distance education.¹⁴⁹ Additionally, the University of Texas System provides a very thorough analysis of varied aspects of the fair use of copyrighted articles, accompanied by “Rules of Thumb” related to the fair use doctrine as applied to coursepacks, distance learning, image archives, multimedia works, music, research copies, and reserves.¹⁵⁰

144. See COPYRIGHT MGMT. CTR., CHECKLIST FOR FAIR USE, *available at* <http://www.masters.edu/DeptPageNew.asp?PageID=1757&minimal=true&print=yes> (last visited Sept. 29, 2006).

145. See, e.g., INTELLECTUAL PROPERTY INFO. CTR., KAN. STATE UNIV., COPYRIGHT BASICS ONLINE TUTORIAL, <http://www.k-state.edu/academicservices/intprop/webtutor/sld001.htm> (last visited Sept. 29, 2006); UNIV. OF MD. UNIV. COLL., WELCOME TO THE COPYRIGHT PRIMER, <http://www-apps.umuc.edu/primer/enter.php> (last visited Sept. 29, 2006); UNIV. OF TEX. SYS., CRASH COURSE IN COPYRIGHT, <http://www.utsystem.edu/OGC/IntellectualProperty/cprintindx.htm> (last visited Sept. 4, 2006) (providing as one of its links a “Crash Course Tutorial” particularly relevant to distance learning). It should be noted that other institutions sometimes link to the University of Texas Systems site for its helpful elucidation of copyright and fair use. See, e.g., SABINE PARISH SCHOOL, COPYRIGHT AND FAIR USE INTERNET SITES FOR EDUCATORS, <http://www.sabine.k12.la.us/edu/copyright.htm> (last visited Sept. 29, 2006).

146. See UNIV. OF WIS., COPYRIGHT & FAIR USE: IS YOUR INTENDED USE EXEMPT UNDER THE FAIR USE PROVISIONS?, *available at* <http://www.uwgh.edu/library/reserves/copyright.html> (last visited Sept. 4, 2006).

147. COPYRIGHT MGMT. CTR., FAIR-USE ISSUES: UNDERSTANDING AND APPLYING FAIR USE, <http://www.copyright.iupui.edu/fairuse.htm> (last visited Sept. 4, 2006).

148. CARNEGIE MELLON UNIV. COPYRIGHT POLICY, *supra* note 140.

149. UNIV. SYS. OF GA. GUIDE TO UNDERSTANDING COPYRIGHT, *supra* note 135.

150. UNIV. OF TEX. SYS., FAIR USE OF COPYRIGHTED MATERIALS: FAIR USE RULES OF THUMB, <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm> (last visited Sept. 29, 2006).

D. Ownership Issues

The range of ownership issues to be addressed in an intellectual property policy is quite broad, encompassing works such as books and articles traditionally regarded as the property of the faculty, to distance education courses that involve information technology, where the construction of the product is a far more complex endeavor, thus complicating the definition of ownership.¹⁵¹ Issues regarding ownership of distance education courses include: who has the duty and/or right to amend or update the course; may the professor continue to utilize the course upon his or her departure from the institution; and may the college or university continue offering the distance education course irrespective of the professor's continuing association with the college or university? The Association of American Universities provides valuable guidelines in this regard, and suggests that by long standing custom, colleges and universities recognize traditional faculty ownership with respect to works such as texts and books.¹⁵² However, with regard to new information technology, the focus "should be less on the product and more on the process through which it is created."¹⁵³ Thus, in determining ownership one must focus on "the status of the contributors, the resources and facilities necessary for creating the work."¹⁵⁴

A review of several college and university copyright policies indicates that many reflect deference to the traditional view that ownership vests with the author-professor for books, manuscripts, literary and visual work, and articles and royalties arising therefrom,¹⁵⁵ while others although recognizing such ownership, may retain licensing rights for purposes of continued use of the course.¹⁵⁶ Some institutions, in contrast, make sharp distinctions in ownership policies respecting classroom technology, and clearly assert ownership of online courses and the underlying courseware.¹⁵⁷ For many, the threshold determinative factor in deciding whether the institution will assert ownership, is the extent of the college or university resources expended on the effort, and whether they were

151. See *supra* text accompanying notes 71–82.

152. See ASS'N OF AM. UNIVS., INTELLECTUAL PROPERTY, *supra* note 131.

153. *Id.* at n.6.

154. *Id.* at n.6 (quoting Dennis P. Thompson, *Intellectual Property Meets Information Technology*, 34 EDUCOM REVIEW 8 (1999), who states "The question of whether information technology products are more like books or more like inventions . . . is precisely the wrong one to ask. It focuses attention on the nature of the product instead of the way it is created. A simple shift of perspective—from attributes of the product itself to the circumstances of its creation—is an essential step in developing a coherent policy for information technology products.").

155. See, e.g., TRINITY UNIV. COPYRIGHT POLICY, *supra* note 53; COLUM. UNIV. COPYRIGHT POLICY, *supra* note 26; STAN. UNIV. COPYRIGHT POLICY, *supra* note 71.

156. See, e.g., UNIV. OF CAL. COPYRIGHT POLICY, *supra* note 133, at § III(A) (noting that ownership rights to Course Materials, including copyright "shall reside with the Designated Instructional Appointee" who created them, the University retains a "fully paid-up, royalty-free, perpetual, and non-exclusive worldwide license to any Course Approval Documents for the purpose of continuing to teach the course of instruction for which the documents were prepared, with the non-exclusive right to revise and update them as required for this purpose.").

157. See, e.g., STAN. UNIV. COPYRIGHT POLICY, *supra* note 71, at § F.

“substantial,”¹⁵⁸ “exceptional,”¹⁵⁹ or “unusual”;¹⁶⁰ whether the works can be regarded as “institutional works,”¹⁶¹ thus triggering college or university ownership; or whether the works can be regarded as “works made for hire.”¹⁶² The Copyright Act and its amendment, the TEACH Act, clearly afford the institution the discretion to determine how these terms should be defined and to establish the standards for ownership in its copyright policy.

E. Ownership Disputes

The copyright policy should establish straightforward procedures by which disputes between the faculty and the college or university regarding ownership of copyrighted works can be resolved. While some institutions choose to appoint an ad hoc committee as the situation arises, the preferable format is to utilize the standing committee for copyright policy, or a subset thereof to hear and adjudicate the disagreements.¹⁶³ Procedures for requesting a hearing should be clearly enunciated, and the final arbiter subsequent to the committee’s decision should be designated. Typically, the Provost, or more commonly the President of the institution, is deemed that final arbiter,¹⁶⁴ but determinations of ownership are made by others as well, as in the case of Stanford University which designates the Dean of Research, or his or her designee, as the final authority in consultation with designated others.¹⁶⁵ As an alternative, arbitration procedures may be used to resolve disputes concerning copyright ownership.¹⁶⁶

158. See, e.g., COLUM. UNIV. COPYRIGHT POLICY, *supra* note 26, at § 1(B).

159. See, e.g., UNIV. OF N.C. COPYRIGHT POLICY, *supra* note 77, at § A(2); UNIV. OF CAL. COPYRIGHT POLICY, *supra* note 133, at § III(C).

160. See, e.g., RIDER UNIV., AGREEMENT BETWEEN RIDER UNIV. AND THE RIDER UNIV. CHAPTER OF THE AAUP: ARTICLE XXXII, § C(3), available at http://www.rider.edu/~aaup/current_contract/XXXII.html (last visited Sept. 29, 2006) (stating that substantial use of University resources that triggers joint ownership of the intellectual property created, includes projects undertaken by the bargaining unit member with the benefit of “substantial or unusual funds, facilities, or opportunities” to which the bargaining member would not ordinarily be entitled).

161. See, e.g., COLUM. UNIV. COPYRIGHT POLICY, *supra* note 26, at § E(1).

162. See, e.g., TRINITY UNIV. COPYRIGHT POLICY, *supra* note 53, at § III (stating that “[a]ny ‘work made for hire’ is the property of the University,” and is defined as follows: 1) Work prepared by an employee within the scope of his or her employment (on the time of the University, in the facilities of the University, and/or with equipment of the University); 2) Work specially ordered or commissioned for certain uses specified in the statutes and when there is a written agreement to consider the work “work made for hire”; and 3) Work accomplished with the support of the University through salary, course credit and/or stipends).

163. See Klein, *supra* note 78, at 249–50 (comparing the informal procedure which exists at the University of Michigan—where a community member requests formal dispute resolution with the Provost who appoints an ad hoc committee—with the preferable standing committee approach to handling disputes exercised at Columbia University and the University of North Carolina).

164. *Id.* at 251.

165. See STAN. UNIV. COPYRIGHT POLICY, *supra* note 71, at § 2(A) (indicating that the Dean of Research shall consult with the Office of Sponsored Research, the Office of Technology Licensing, and the Legal Office in making his or her determinations).

166. Klein, *supra* note 78, at 252 (noting that the University of Washington submits

F. Conflict of Interest and Commitment Principles

Integrally related to the issue of ownership of copyrighted works in the distance education arena, in particular, is the question of whether a faculty member at a college or university can develop an online distance education course for a competing institution.¹⁶⁷ The Association of American Universities (AAU) observes that the new information technologies create this potential area of commitment dilemmas for the institution.¹⁶⁸

In principle, AAU recommends that “full-time faculty at one university should not be permitted . . . to develop commercially related new media technology of content for another university or for a private company without the home university’s approval.”¹⁶⁹ The rationale supporting such a position is likely similar to the concerns expressed by Harvard University when Professor Arthur R. Miller contracted with Concord University School of Law to create and provide it with several videotaped lectures for a course to be offered by Concord: a dilution of the value of the Harvard name, and a confusion among the public as to whether Professor Miller remained, in fact, associated with Harvard.¹⁷⁰ The American Association of University Professors, however, which favors faculty ownership of works that are “created independently and at the faculty member’s own initiative,”¹⁷¹ notes that the stance adopted by Harvard and others is not uniformly accepted, and that some colleges and universities, through contract negotiations, afford their faculty members the right to offer online distance education courses at other institutions.¹⁷² The University of Michigan addresses this issue in an in-depth fashion in that part of its “University Policy” that speaks to ownership of copyrighted works created at or in affiliation with the University, concluding that “consistent with conflict of interest and commitment principles, faculty with full-time appointments at the University should not use (or permit others to use) their works in ways that compete with the University’s courses, or its educational

unresolved disputes to a single arbitrator for binding arbitration, and Carnegie Mellon community members may seek binding arbitration that is consistent with the Rules of the American Arbitration Association).

167. See Klein, *supra* note 78; Marcus, *supra* note 81 (discussing the conflict that arose when Harvard University Professor Arthur Miller created a set of video lectures on civil procedure for the Concord University School of Law, an online degree granting law school).

168. See ASS’N OF AM. UNIVS., INTELLECTUAL PROPERTY, *supra* note 131. AAU recommends that institutions contemplating implementing regulations addressing this issue examine Princeton University’s conflict of commitment policy, and notes that it is “quite explicit about requiring faculty to receive permission from the University when they wish to teach at another school.” *Id.* at n.22.

169. *Id.* at § II.

170. See Marcus, *supra* note 81 (asserting that Harvard University representatives described the education offered by Concord University School of Law, in its totally online format, as an inferior means of obtaining a legal education).

171. Donna R. Euben, *Distance Learning and Intellectual Property: Ownership and Related Faculty Rights and Responsibilities* § II(B), (2000), available at <http://www.aaup.org/Legal/info%20outlines/legdl.htm>.

172. *Id.*

programs or activities—unless prior written permission is obtained.”¹⁷³ The vast potential applications of online distance education classes clearly dictates that a comprehensive copyright policy consider and clarify its position on conflict and commitment issues respecting such copyrighted works.

G. TEACH Act Guide

It is further suggested that any broad-based copyright policy that is adopted by an institution should address and clarify issues related to the TEACH Act such as designating and/or defining: what works may be lawfully transmitted in a distance education course; what constitutes “limited and reasonable” use of dramatic literary or musical copyrighted materials in online distance education as set forth in the TEACH Act; in what fashion must a faculty supervise a mediated instructional activity; how may the institution ensure authentication of enrolled students, prevent redistribution of copyrighted works by the students and limit exposure of copyrighted works to a class session; and when may faculty digitize works that exist in analog format. All of these would both complement any existing university policies that may be directed to issues regarding the fair use doctrine and/or ownership of copyrightable materials, and satisfy the requisites of the TEACH Act regarding providing educational materials to members of the college or university community. One way this can be achieved is by providing a summary of these issues within the copyright policy with a link to a detailed TEACH Act Guide. The Association of Research Libraries links to two excellent resources¹⁷⁴ to serve as models for such a guide: “The TEACH Toolkit,” published by North Carolina State University¹⁷⁵ and “The TEACH Act Finally Becomes Law,” published by the University of Texas System.¹⁷⁶

There obviously exist numerous other issues which can be addressed in a college or university copyright policy statement, such as how to seek permission to use copyrighted material that does not fall within the purview of either the TEACH Act or fair use doctrine, how to file claims of alleged copyright infringement, how the institution should respond to repeated acts of infringement on the part of any member of its community, and whether the institution shall defend willful violators

173. See UNIV. OF MICH. UNIV. POLICIES, *supra* note 71, at § I(A)(2). The statement clarifies that this provision applies to works developed for other institutions, including for-profit and online institutions. Significantly, the statement clarifies that such approval is not a requisite for traditional scholarly endeavors such as “ordinary outside consulting; participation in professional or scholarly organizations; scholarly presentations and publications; pursuit of future employment opportunities; and public service.” *Id.*

174. ASS’N OF RESEARCH LIBRARIES, TECHNOLOGY, EDUCATION, AND COPYRIGHT HARMONIZATION (TEACH) ACT: RESOURCES, <http://www.arl.org/info/fm/copy/TEACH.html> (last visited Sept. 29, 2006).

175. N.C. STATE UNIV., THE TEACH TOOLKIT: AN ONLINE RESOURCE FOR UNDERSTANDING COPYRIGHT AND DISTANCE EDUCATION, <http://www.lib.ncsu.edu/scc/legislative/teachkit/> (last visited Sept. 29, 2006).

176. UNIV. OF TEX. SYS., FINALLY BECOMES LAW, *supra* note 50. The University of Georgia also provides a very helpful guide to questions regarding the TEACH Act which may serve as a template. OFFICE OF LEGAL AFFAIRS, UNIV. SYS. OF GA., GUIDE TO THE TEACH ACT, *available at* http://www.usg.edu/legal/copyright/teach_act.phtml (last visited Sept. 29, 2006).

of copyright, among many others. The TEACH Act mandates that in order for a college or university to derive its benefits of expanded use of copyrighted works in distance education, one precondition to its umbrella of coverage is that a copyright policy must be implemented by the institution. On April 7, 2006, U.S. Senate Resolution 438 was introduced, which served as a testament to Congressional recognition of the need for higher education institutions to set the standard for deterring and eliminating copyright infringement.¹⁷⁷ Noting that colleges and universities are “uniquely situated to advance the importance and need for strong intellectual property protection,” the resolution urges that “colleges and universities should continue to take a leadership role in educating students regarding the detrimental consequences of online infringement of intellectual property rights.”¹⁷⁸ Adoption of a comprehensive copyright policy will demonstrate the institution’s recognition of the intellectual property rights of others and its commitment to the enforcement of all laws related to such rights.

177. S. Res. 438, 109th Cong. (2006).

178. *Id.* It should be noted that in this resolution, Congress is responding to the unauthorized peer-to-peer file sharing conducted by college and university students. It reflects, nonetheless, a clear recognition of the value and importance of intellectual property protection in encouraging creativity and innovation, and the need for such institutions of higher education to develop policies that educate and encourage respect for protecting intellectual property rights.

WHO ARE YOU? FRAUDULENT CREDENTIALS AND BACKGROUND CHECKS IN ACADEME*

BARBARA A. LEE**

“Get a genuine college degree in 2 weeks?” says an email advertisement that includes a telephone number that is available twenty-four hours a day, seven days a week. “No Study Required! 100% Verifiable!” says another advertisement, referencing the same telephone number. Apparently some individuals have taken advantage of this opportunity; an investigation in 2004 by the General Accounting Office found twenty-eight employees of the federal government who had “bogus degrees,” and another 463 federal employees who were enrolled in unaccredited institutions.¹ In Pennsylvania, a cat named Colby was awarded a master’s of business administration from a “diploma mill” called the “University of Berkley” that was subsequently sued by the Pennsylvania attorney general and shut down.² Colby’s transcript showed that the cat had a 3.5 grade point average and had attended the university for four semesters.³ The Secret Service has also raided homes and offices in three states, shutting down several fraudulent operations that provided diplomas for non-existing institutions such as “St. Regis University” and “James Monroe University.”⁴

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1. Stephen Barr, *An Endless Search for Accountability*, WASH. POST, May 16, 2004, at C2.

2. David Epstein, *Class Dismissed*, INSIDE HIGHER EDUC., July 8, 2005, available at <http://insidehighered.com/news/2005/07/08/mill>.

3. Debbi Mack, *Circuit Roundup*, CORP. LEGAL TIMES, Mar. 2005, at 72.

4. Thomas Bartlett, *Government Raids a Diploma Mill*, CHRON. HIGHER EDUC., Sept. 2, 2005, at A39. The former executive vice chancellor of “St. Regis University,” Richard J. Novak, agreed to plead guilty to wire and mail fraud and to violations of the Foreign Corrupt Practices Act. These pleas may lead to a prison sentence of up to ten years and fines of more than \$2 million. Thomas Bartlett, *Fake University Paid Bribes for Credentials*, CHRON. HIGHER EDUC.,

A related problem involves resume fraud, in which an individual either claims to have a degree that he or she has not earned or work experience that he or she has not had, or inflates prior work experience to make it appear that the position was more responsible or at a higher level than it actually was. For example, a professor in California who was named the state's poet laureate claimed to have a college degree, but had not earned one.⁵ A football coach hired by the University of Notre Dame claimed to have a master's degree that he had not earned.⁶ A popular professor who had taught for four years at Pennsylvania State University was found to have committed murder as a teenager and to have earned his college degree in prison.⁷

Staff members may also have misrepresented their academic or work credentials, or may have failed to disclose convictions for crimes that are related to their job responsibilities. One commentator estimates that at least fifteen percent of all job applicants in business organizations fail to report criminal convictions;⁸ another reports that nearly one quarter (twenty-three percent) of all applicants misrepresent their educational or employment credentials.⁹ Thorough background checks could very likely have identified these misrepresentations or omissions at the time these individuals were hired, and would have saved the employer embarrassment or, worse, legal liability if the employee harmed someone.¹⁰

Some states have enacted laws requiring background checks for certain employees, such as schoolteachers, day care workers, nurses, or other individuals who work with children, disabled individuals, or others who cannot care for themselves.¹¹ Many nonprofit organizations have implemented background checks for volunteers who work with youth.¹²

Although individuals have challenged employers' use of background checks,

Mar. 31, 2006, at A14.

5. Robin Wilson, *Fall From Grace*, CHRON. HIGHER EDUC., Apr. 4, 2003, at A10.

6. Welch Suggs, *Lessons Unlearned*, CHRON. HIGHER EDUC., July 5, 2002, at A37.

7. Scott Smallwood, *The Price of Murder*, CHRON. HIGHER EDUC., Sept. 12, 2003, at A8.

8. David Kelly, *How Well Do You Know Your Workforce?*, HR WIRE, Oct. 8, 2001, <http://www.hrwire.com/story.asp?01100808.htm>.

9. Merry Mayer, *Background Checks in Focus: Thorough Screening of Recruits Can Help Prevent Surprises*, HR MAGAZINE, Jan. 2002. A study conducted by ResumeDoctor.com reviewed over 1,100 resumes and found that forty-three percent had one or more "significant inaccuracies," including misrepresentations of education, job title, and dates of employment. David Koeppl, *Fudging the Facts on a Resume is Common, and Also a Big Risk*, N.Y. TIMES, Apr. 23, 2006, at 10-11.

10. For an overview of criminal background checks and sex offender background checks, see Paul G. Lannon & Maura J. Gerhart, *Campus Security: Keeping the Bad Ones Out and the Good Ones Safe*, NACUA 45th Annual Conference (June 2005), available at <http://www.nacua.org/meetings/virtalseminars/june2006/Documents/02I%20Lannon.DOC>.

11. See, e.g., Arkansas Nurses Practice Act, ARK. CODE ANN. § 17-87-312 (2005) (requiring background checks for first time applicants for a nursing license); CAL EDUC. CODE § 44332.6 (1998) (requiring a background check prior to issuance of a temporary certificate to work in an elementary or secondary school). See also N.J. STAT. ANN. 15A:3A-1 (2000) (requiring organizations serving youth to conduct background checks of both employees and volunteers).

12. Stephanie Strom, *Groups Expanding Background Checks*, N.Y. TIMES, Aug. 4, 2005, at A12.

including fingerprinting, under constitutional¹³ and common law¹⁴ theories, courts have upheld the use of background checks as long as appropriate notice of the background check was given to the individual. A number of colleges and universities, including James Madison University (Virginia), the California State University system, the University of Arizona, the University of Montana, Frostburg State University (Maryland), and Rowan University (New Jersey), conduct criminal background checks on either all employees, or on non-faculty employees. Pennsylvania State University initiated background checks for all new employees, including faculty, after discovering that a popular faculty member had committed murder over twenty years earlier.¹⁵

This article addresses fraudulent credentials and the use of background checks for faculty and staff positions at colleges and universities. After reviewing the relatively sparse litigation related to fraudulent credentials, the article discusses the various sources of legal liability for colleges and universities when either applicants or employees challenge the use or results of background checks, or when some third party alleges that the lack of a background check (or a defective background check) caused that individual some harm. The article also reviews employer defenses to legal challenges for the discipline or discharge of employees, or for the failure to hire, based upon the results of background checks. Finally, the article discusses legal and policy considerations in developing a policy for the use of background checks for employment decisions.¹⁶

I. FRAUDULENT CREDENTIALS

The problem of misrepresentation of academic degrees occurs in two ways. The individual may claim to have a degree that he or she did not earn, which is an action called "resume fraud." Or the individual may have obtained a fraudulent degree from a "diploma mill," an entity that sells diplomas and transcripts to individuals. Often these diploma mills have names that sound similar to actual colleges and universities, such as "Columbia State University"¹⁷ or "the University

13. *De Veau v. Braisted*, 363 U.S. 144 (1960), discussed in Catherine L. Donohue, *Review of Selected 1997 California Legislation: School Safety: Brutal Slaying Prompts Creation of Employee Criminal Background Check Prior to Employment*, 29 MCGEORGE L. REV. 729 (1998). See also *Henry v. Earhart*, 553 A.2d 124 (R.I. 1989) (rejecting constitutional challenge to mandatory fingerprinting and background checks of schoolteachers). For a discussion of the constitutionality of fingerprinting, see Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 WM. & MARY BILL RTS. J. 1273 (2003).

14. See, e.g., *Barr v. Great Falls Int'l Airport Auth.*, 107 P.3d 471 (Mont. 2005).

15. Smallwood, *supra* note 7.

16. Colleges and universities may also conduct background checks on applicants or students, particularly those who will be placed in clinical settings such as hospitals or public schools. Conducting background checks on students may raise issues under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (Supp. 2002). Legal issues related to background checks on students are beyond the scope of this article.

17. *UCLA Soccer Coach Concedes that Degree Came from Diploma Mill*, CHRON. HIGHER EDUC., Feb. 8, 2002, at A39.

of Berkley.¹⁸ Attempting to use a fake degree is apparently not a crime in most states,¹⁹ which means that applicants may risk job loss but not jail time if they lie on applications or use diploma mill degrees to obtain a job or a promotion.

The scope of the problem is substantial. Since 1999, a variety of college and university administrators, athletics coaches, and faculty have been found to have falsified or exaggerated their academic credentials. The former president of Albright College (Pennsylvania) resigned after it was discovered that fellowships and board memberships that he had listed on his resume were fabrications,²⁰ and the president of Quincy University (Illinois) resigned after the trustees discovered that he had not earned two master's degrees that he had listed on his resume.²¹ Quincy Troupe, a professor at the University of California at San Diego, retired after it was discovered that he did not have the bachelor's degree that he claimed.²² The inaccuracy was discovered when Troupe was named as California's poet laureate.²³ The former associate director of the Lawrence Livermore National Laboratory resigned when it was discovered that he had not earned a Ph.D. in applied physics from Princeton, as his superiors believed that he had.²⁴ And several athletics officials were either dismissed or withdrew from new positions

18. Epstein, *supra* note 2.

19. North Dakota and Oregon have enacted laws that make the use of a fake degree to attempt to obtain a job a misdemeanor. See N.D. CENT. CODE, § 15-20.4-15 (LexisNexis 2003) (stating that issuing or using a false academic degree is a class C felony, and using or claiming to have a false academic degree to obtain employment, to obtain a promotion or higher compensation, to obtain admission to an institution of higher learning, or in connection with any business, trade, profession, or occupation is a class A misdemeanor). See also O.R.S. § 348.609 (2005) (forbidding individuals from representing that they have an "academic degree" unless it has been awarded by an accredited institution or has met other standards established by the Oregon Student Assistance Commission). Individuals found guilty may be fined up to \$1,000. Will Potter, *States Try to Crack Down on Diploma Mills*, CHRON. HIGHER EDUC., Dec. 19, 2003, at A26. And federal employees who misrepresent their educational credentials may be prosecuted under 18 U.S.C. § 1001, which provides for a fine of up to \$10,000 or imprisonment for not more than five years, or both, for making a "false, fictitious or fraudulent statement or representation" to a federal agency. 18 U.S.C. § 1001 (2000), amended by Act of July 27 2006, 18 U.S.C.A. § 1001 (West Supp. 2006). Other states prohibit the use of false information including: Colorado (COLO. REV. STAT. § 26-6-1-5.5 (West 2002)) (child care providers); Illinois (720 ILL. COMP. STAT. 5/17-2.5 (West Supp. 2006)) (college employees); Iowa (IOWA CODE § 715.6A(2)(d) (West 2003)); Michigan (MICH. COMP. LAWS § 390.1604 (West Supp. 2005)); New Jersey (N.J. STAT. ANN. § 18A:3-15.2 (West 1999)); Ohio (OHIO REV. CODE ANN. § 4715.19 (West 2006)) (dentists); and Tennessee (TENN. CODE ANN. § 39-17-112(b) (2004)). A few states outlaw the false production or alteration of an academic degree: Iowa (IOWA CODE § 715A.6A(2)(a) (2005)); Michigan (MICH. COMP. LAWS § 390.1603 (2005)); and Tennessee (TENN. CODE ANN. § 39-17-112(a) (2004)).

20. Julianne Basinger, *4 Years After a Scandal, a President Steps Down*, CHRON. HIGHER EDUC., Mar. 5, 2004, at A23.

21. Lindsay Bosslett, *President Quits after Resume is Questioned*, CHRON. HIGHER EDUC., Nov. 8, 2002, at A29.

22. *Id.*

23. Elizabeth F. Farrell, *California's Poet Laureate Admits to Lie on Resume*, CHRON. HIGHER EDUC., Nov. 15, 2002, at A15.

24. Robin Wilson, *Lab Official Resigns Over Lack of a Ph.D.*, CHRON. HIGHER EDUC., Sept. 17, 1999, at A18.

after it was discovered that they had not earned graduate degrees that they claimed on their resumes,²⁵ or their degrees were from diploma mills rather than accredited institutions.²⁶

Litigation involving resume fraud typically arises when an employer discharges an employee for falsifying his or her educational background on an employment application. Although one court asserted that misrepresenting one's educational attainment is not illegal,²⁷ judges have been unsympathetic to employees who have challenged discharges linked to resume fraud.²⁸

Many such challenges involve claims that the discharge was motivated by discrimination rather than by the employee's misrepresentation. For example, in *Williams v. Boorstin*,²⁹ the former employee had claimed several educational credentials, including a law degree from Georgetown University that he had not earned, to secure a position as a copyright examiner at the Library of Congress. The court rejected the plaintiff's claim of race discrimination and retaliation, ruling that the plaintiff's "formidable record of lying" to the employer clearly justified his discharge.³⁰ In other cases, plaintiffs have challenged their discharges on the grounds of retaliation for claims of sexual harassment. In *Fishel v. Farley*,³¹ a woman who misrepresented her educational credentials on her employment application was discharged for the falsification after she made a sexual harassment complaint. She sued the employer for harassment, but lost both that claim and the claim that her termination was retaliatory.³² The court found that the employer had responded promptly and appropriately to her harassment claim, and that the falsification was ample grounds for discharge.³³ Similarly, in *Rizzo v. Sheahan*,³⁴ a police officer who falsely claimed that she had earned a General Equivalency Diploma, and who submitted fraudulent documentation of such credential, was discharged after filing a sexual harassment complaint. The investigation of her fraudulent documentation had occurred prior to her filing the harassment complaint, and the court ruled that the employer had discharged her for just cause.³⁵

Public employees may bring constitutional claims when challenging a discharge based upon resume fraud. In *Barszcz v. Bd. of Trs. of Cmty. Coll. Dist. No. 504*,³⁶ a professor at Triton College stated on his application that he would receive his master's degree in economics a few months later. He did not receive the degree,

25. Welch Suggs, *Athletic Director Caught in 2002 Resume Scandal Gets a Second Chance*, CHRON. HIGHER EDUC., May 7, 2004, at A41.

26. *UCLA Soccer Coach Concedes that Degree Came From Diploma Mill*, *supra* note 17.

27. *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650 (4th Cir. 2004).

28. *See, e.g., Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980).

29. 663 F.2d 109.

30. *Id.* at 117.

31. No. 93-480, 1994 WL 43793 (E.D. La., Feb. 8, 1994).

32. *Id.* at *10.

33. *Id.* at *9.

34. No. 97 C 3995, 2000 WL 679982 (N.D. Ill., May 22, 2000).

35. *Id.* at *11.

36. 400 F. Supp. 675 (N.D. Ill. 1975).

and he did not inform college officials.³⁷ He was tenured three years later.³⁸ According to the court, he “wore a masters [sic] gown at several graduation ceremonies and accepted a salary consistent with that earned by Triton College teachers possessing masters [sic] degrees.”³⁹ Furthermore, the college catalog listed him as holding a master’s degree.⁴⁰ The college decided to terminate him without a hearing, but it allowed him to continue to teach until the end of the semester, and it then provided a full evidentiary hearing.⁴¹ The professor claimed that his termination violated the Fourteenth Amendment’s Due Process Clause, but the court disagreed, saying that the post-termination hearing satisfied constitutional dictates.⁴²

Misrepresenting one’s educational credentials may not only lead to termination, but may also make the individual ineligible for any severance benefits to which he or she otherwise would have been entitled. In *Moos v. Square D Co.*,⁴³ the plaintiff had given an altered college transcript to the employer at the time he was hired, stating that he had earned a college degree (which he had not), and raising the grades he had received in seven classes.⁴⁴ When a change of management occurred and the plaintiff was selected to be laid off, he again submitted the altered transcript to claim certain severance benefits.⁴⁵ When the employer discovered the misrepresentation, the plaintiff was discharged.⁴⁶ The plaintiff filed a lawsuit under the Employee Retirement Income Security Act,⁴⁷ claiming that the benefit plan administrator’s refusal to award him benefits violated the Act.⁴⁸ The trial court awarded summary judgment to the employer, and the appellate court affirmed, saying that the plan administrator had the discretion to determine that the plaintiff’s multiple misrepresentations concerning his credentials disqualified him from receiving the benefits.⁴⁹

Similarly, misrepresenting one’s educational credentials may make one ineligible for unemployment compensation once a job is lost. In *Denberg v. Loretto Heights Coll.*,⁵⁰ the plaintiff, who had worked as a part-time instructor at the college, applied for a full-time position.⁵¹ To be hired for the position, he was required to provide transcripts for the degrees he claimed to have earned.⁵² The

37. *Id.* at 677.

38. *Id.*

39. *Id.* at 677.

40. *Id.*

41. *Id.*

42. *Id.* at 679–80.

43. 72 F.3d 39 (6th Cir. 1995).

44. *Id.* at 40.

45. *Id.* at 41.

46. *Id.*

47. 29 U.S.C. § 1001 (2000).

48. *Moos*, 72 F.3d at 41.

49. *Id.* at 41–43.

50. 694 P.2d 375 (Colo. Ct. App. 1984).

51. *Id.* at 376.

52. *Id.*

plaintiff submitted forged transcripts stating that he had earned a Ph.D. from New York University, an M.A. from the University of New Mexico, and a B.A. from Hunter College.⁵³ In truth, the plaintiff had earned no college degrees at all.⁵⁴ Although the plaintiff informed his supervisor of his misrepresentations approximately four weeks after he had begun teaching, the supervisor did not inform the assistant dean of the problem until four months later.⁵⁵ When the assistant dean verified the misrepresentation, the plaintiff was fired.⁵⁶

The plaintiff applied for unemployment benefits, arguing that the discharge was without merit.⁵⁷ Because the plaintiff's teaching had been rated as satisfactory, he asserted that the degrees he claimed were immaterial to the job requirements.⁵⁸ He also asserted that the college's four-month tolerance of his misrepresentation was a waiver of the right to terminate him.⁵⁹ The court rejected both claims, ruling that possessing earned graduate degrees is an appropriate requirement for a faculty position, and that the college's accreditation status could have been threatened had it retained a full-time professor who had never earned a college degree.⁶⁰ The court upheld the denial of unemployment benefits.⁶¹

When an employee deceives the employer about his or her educational credentials, the employer may face legal liability from third parties. For example, in *Univ. of North Carolina v. Shoemate*,⁶² a resident at the university's hospital was hired after he presented forged documents supporting misrepresentations about his educational credentials.⁶³ The resident treated patients at the hospital for over a year before the misrepresentations were discovered.⁶⁴ A patient whom the resident had treated filed a malpractice action against the resident and the hospital, but the hospital refused to provide malpractice coverage for the resident, stating that his employment contract was obtained by fraud and thus was void.⁶⁵ Although the trial court ruled for the hospital, the appellate court reversed, stating that the resident was the hospital's agent, and thus, the hospital was obligated to provide malpractice coverage for him, despite his fraud, and irrespective of whether a valid employment contract existed.⁶⁶

Similarly, a construction consulting firm lost its motion for summary judgment

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 377.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* For a case brought by a security guard who was terminated when it was discovered that he had claimed a college degree that he had not earned, see *Miller v. Del. State Univ.*, No. 93A-12-001, 1994 WL 380442 (Del. Super. Ct. July 13, 1994).

62. 437 S.E.2d 892 (N.C. Ct. App. 1994).

63. *Id.* at 893.

64. *Id.* at 893-94.

65. *Id.* at 894.

66. *Id.* at 898.

when one of its clients sued the firm for losses it sustained, which it blamed on the defendant firm's employee.⁶⁷ That employee had claimed credentials that he did not possess; he had testified at an arbitration hearing on behalf of the client, and his misrepresentations had been discovered at that time.⁶⁸ The client argued that this revelation caused it to lose the arbitration and a large sum of money.⁶⁹ The plaintiff client sued the individual's employer for negligence, fraud, and breach of contract.⁷⁰ The court refused to award summary judgment to the defendant employer, stating that there was evidence that the client had relied upon the employer's representations concerning the employee's credentials.⁷¹

A case involving an employee protected by civil service regulations demonstrates the importance of prompt verification of an employee's educational credentials. In *Bond v. Dept. of Rehab. & Corrs.*,⁷² the plaintiff applied for a position as business administrator at the Mansfield Correctional Institution.⁷³ He claimed to have an MBA from Ashland College, which he had not earned.⁷⁴ The plaintiff was hired and worked for four years before the misrepresentation was discovered.⁷⁵ When the prison warden discovered the fraud, he discharged the plaintiff.⁷⁶ The State Personnel Board of Review upheld the discharge, and the trial court to which the plaintiff appealed affirmed the board's decision.⁷⁷ The appellate court reversed, citing the provisions of the state's administrative code requiring any discipline to be initiated no later than two years after its occurrence.⁷⁸ Because the falsification occurred four years before the plaintiff's discharge, the prison was barred by the regulation, which acted as a statute of limitations, from disciplining the plaintiff for his fraud.⁷⁹ Furthermore, had the prison followed the state's rules concerning the verification of educational credentials for employees, the fraud would have been discovered in time to discharge the plaintiff properly.⁸⁰

As the cases discussed above demonstrate, employees usually (but not always) lose challenges to discharges that occur when resume fraud or a fraudulent credential is discovered. The cases also demonstrate that the employee's fraud may involve the employer in legal claims of third parties in addition to litigation over the discharge. Therefore, the cases provide substantial legal justification for the wisdom of checking employees' credentials before hiring them.

67. *Wartsila NSD N. Am., Inc. v. Hill Int'l., Inc.*, 342 F. Supp. 2d 267, 270 (D.N.J. 2004).

68. *Id.* at 271.

69. *Id.* at 272.

70. *Id.*

71. *Id.* at 288–91.

72. No. 99–CA–22, 2000 WL 1604 (Ohio Ct. App. Dec. 21, 1999).

73. *Id.* at *1.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at *1–2.

78. *Id.* at *1–3 (citing OHIO ADMIN. CODE 124:3-04 (2003)).

79. *Id.* at *2–3.

80. *Id.* at *3.

II. LEGAL CONSIDERATIONS IN USING BACKGROUND CHECKS⁸¹

A. Statutory Requirements

Federal law⁸² and the laws of several states⁸³ regulate how background checks are conducted and the type of information to which the subject of the background check is entitled. The federal Fair Credit Reporting Act (“FCRA”) regulates the use of “consumer reports,” defined as reports about an individual’s personal and credit characteristics, character, general reputation, and lifestyle.⁸⁴ If the employer conducts its own background check without the use of an external agent, then the FCRA does not apply.⁸⁵ If, however, the employer uses an outside credit reporting, investigative service, or other entity to perform any aspect of the background check,⁸⁶ the FCRA requires that certain steps be taken with respect to

81. For a discussion of the legal constraints on various types of background checks, see MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 173–92 (Bureau of National Affairs, Inc. ed., BNA Books 2d ed. 2003).

82. Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (2000). The Federal Trade Commission enforces the FCRA.

83. See, e.g., California Consumer Credit Reporting Agencies Act (CCRA), CAL. CIV. CODE §§ 1785.1–1785.36 (West 1998 & Supp. 2006) and the California Investigative Consumer Credit Reporting Agencies Act (ICRA), CAL. CIV. CODE §§ 1786–1787 (West 1998 & Supp. 2006). Several states require background checks for certain positions, such as school, residential care, or health care employees, and specify how the information may be used, to whom it may be disclosed, and whether the candidate has the right to obtain a copy of the background check report. See, e.g., Alabama: ALA. CODE § 16-22A-3(7) (LexisNexis Supp. 2005); Alaska: ALASKA STAT. § 14.20.017 (2004); Arizona: ARIZ. REV. STAT. § 15-512 (LexisNexis 2002 & Supp. 2005); Arkansas: ARK. CODE ANN. § 6-17-411 (Supp. 2005); Delaware: DEL. CODE ANN. 11 § 8571 (2001 & Supp. 2004); District of Columbia: D.C. CODE §§ 4-1501.01–4-1501.11 (LexisNexis Supp. 2006); Idaho: IDAHO CODE ANN. § 56-1004A (Supp. 2006); Illinois: 105 ILL. COMP. STAT. 5/10-21.9 (2006); Indiana: IND. CODE § 10-13-3-38.5 (LexisNexis Supp. 2006); Louisiana: LA. REV. STAT. ANN. §§ 15:587(1)(C), 17:15 (Supp. 2006); Minnesota: MINN. STAT. § 123B.03 (West Supp. 2006); Mississippi: MISS. CODE ANN. § 37-9-17 (West Supp. 2005); New Mexico: N.M. STAT. § 22-10A-5 (LexisNexis 2006); New York: N.Y. EDUC. LAW § 3035 (McKinney Supp. 2006); North Dakota: N.D. CENT. CODE § 12-60-24 (Supp. 2003); Ohio: OHIO REV. CODE ANN. §§ 109.572, 3301.32 (LexisNexis Supp. 2006); Oregon: OR. REV. STAT. § 326.603 (2005); Pennsylvania: 23 PA. CONS. STAT. ANN. § 6355 (West 2001); Rhode Island: R.I. GEN. LAWS §§ 12-1-4, 16-2-18.1 (Supp. 2005); Texas: TEX. EDUC. CODE ANN. § 22.083 (Vernon 2006); Utah: UTAH CODE ANN. § 53A-3-410 (Supp. 2005); Washington: WASH. REV. CODE § 28A.400.301 (West 2006).

84. 15 U.S.C. § 1681a(d)(1) (Supp. 2003). “Consumer reports” may include checks of Department of Motor Vehicle records, criminal background checks, and, under some circumstances, drug test results. Teresa Butler Stivarius et al., *Background Checks: Four Steps to Compliance in a Multistate Environment*, SOC’Y FOR HUMAN RES. MGMT., Mar.–Apr. 2003.

85. See 15 U.S.C. § 1681 (2000).

86. According to a report published by the Bureau of National Affairs, “most employers that want to conduct criminal history checks on their workers and job applicants use third-party consumer reporting agencies.” Eric Lekus, *Privacy Rights: Using FBI Databases for Hiring Purposes Raises Many Issues, Commentators Tell DOJ*, DAILY LAB. REP., Vol. 3, No. 40, Oct. 14, 2005, at 1364, available at <http://pubs.bna.com/ip/BNA/whl.nsf/is/a0b1p5k6d3>.

the information obtained from external agents.⁸⁷

1. The employer must notify the job candidate in writing, “in a document that consists solely of the disclosure,” that a consumer report may be used to make a hiring decision;⁸⁸
2. The employer must obtain the candidate’s written authorization to obtain a consumer report from an external agent;⁸⁹
3. If the employer relies on the consumer report to make a negative hiring or other employment decision, the employer must, prior to making the decision, give the candidate a pre-adverse action disclosure, a copy of the consumer report, and a copy of a summary of the individual’s rights under the Fair Credit Reporting Act, which the consumer reporting agency is required to provide along with the consumer report;⁹⁰
4. After the employer has made a negative employment decision, the employer must give the candidate notice of the negative action in oral, written, or electronic form. The notice must include the name, address, and telephone number of the consumer reporting agency that supplied the consumer report, a statement that the consumer reporting agency did not make the negative employment decision, and a notice of the candidate’s right to dispute the accuracy or completeness of the information provided by the consumer reporting agency, as well as notice of the candidate’s right to obtain a free consumer report from the agency within sixty days.⁹¹

The employer will also be required to certify to the consumer reporting agency that the employer will not misuse any information in the report in a manner that would violate federal or state equal employment opportunity laws or regulations.⁹²

The Federal Trade Commission has stated that a criminal background check conducted by the state police or the FBI is not a “consumer report” because these agencies perform these roles as part of their statutory duty to protect the public.⁹³ Furthermore, the FCRA does not apply to a communication by a previous employer to a prospective employer that involves information about the candidate’s “employment history and job performance” (e.g., a reference check,

87. See 15 U.S.C. § 1681 (2000).

88. 15 U.S.C. § 1681b(b)(2)(A)(i) (2000).

89. See *id.* § 1681b(b)(2)(A)(ii). Although the regulations do not address the use of electronic authorizations or “mouse clicks” to indicate acceptance of an employer’s requirements, it would appear that such forms of obtaining candidates’ authorization would not be excluded from the FCRA.

90. See *id.* § 1681b(b)(3)(A).

91. See *id.* § 1681b(b)(3)(B)(i).

92. See *id.* § 1681b(b)(1)(A).

93. Letter from Clarke W. Brinckerhoff, Attorney, Federal Trade Commission, Division of Credit Practices Bureau of Consumer Protection, to A. Dean Pickett, Attorney, Magnum, Wall, Stoops & Warden, July 10, 1998, <http://www.ftc.gov/os/statutes/pickett/index.htm>.

whether oral or written).⁹⁴ If an employer hires a private investigator to contact a candidate's references, current or former colleagues or neighbors, or to verify previous employment history and performance, that information would be considered to be a "consumer report" and would be subject to the FCRA.⁹⁵ But if the employer uses its own employee(s) to collect such information, the FCRA would not apply.⁹⁶

International background checks may require compliance with the laws of other countries or aggregations of countries. For example, the European Union's Directive on Data Protection regulates the transfer of personally-identifiable data to countries whose laws regarding data privacy do not meet the standards of the EU's Directive.⁹⁷ The U.S. Department of Commerce, in collaboration with the European Commission, has developed a "Safe Harbor" framework.⁹⁸ Employers certifying that they comply with this framework will be added to a "Safe Harbor List" and will be permitted to receive personal data from countries that are members of the European Union.⁹⁹

B. Lawsuits by Applicants or Current Employees

As noted above, individuals who have been rejected for employment as a result of background checks, or whose employment has been terminated after a background check was done, have challenged their use under tort and discrimination theories. Tort claims include defamation, negligence in obtaining or using the report, and invasion of privacy. Discrimination claims typically involve allegations of race discrimination. Although there have been few legal challenges to the use of background checks, litigation against nonacademic employers is instructive in analyzing how courts respond to plaintiffs' claims with respect to the use of background checks.

Employers should use care in communicating the results of a background check to co-workers or others who do not have a business need to know the information, particularly if it indicates prior criminal convictions. In *McClesky v. Home Depot, Inc.*,¹⁰⁰ an employee sued his former employer for defamation and negligence.¹⁰¹ McClesky was terminated from his position at a Home Depot store for falsification of his employment application.¹⁰² Although the employee had claimed on his

94. *Id.*

95. *Id.*

96. *Id.*

97. Directive 95/46/EC On the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

98. U.S. Department of Commerce, Export Portal, <http://www.export.gov/safeharbor/> (last visited Sept. 18, 2006). For a series of recommendations concerning international background checks, see Jason Morris, Nick Fishman & Robert Thompson, *Tips for Conducting International Background Checks*, SOC'Y FOR HUMAN RES. MGMT., June 2005, http://www.shrm.org/global/library_published/subject/nonIC/CMS_012943.asp.

99. *Id.*

100. 612 S.E.2d 617 (Ga. Ct. App. 2005).

101. *Id.* at 618.

102. *Id.*

employment application that he had not been convicted of a criminal offense in the past five years, a background check revealed that he had used an alias and had, indeed, been convicted of a variety of felonies during the five-year period.¹⁰³ McClesky claimed that the information in the background check was false and he took exception to the fact that three individuals were present at a meeting at which he was told that he was dismissed for falsification of his employment application.¹⁰⁴ The court noted that the three employees present at the meeting were the store manager, an assistant manager, and a loss prevention specialist, all of whom had a business reason to be present and to know the reason for McClesky's discharge.¹⁰⁵ The court determined that a fourth individual, who was told later that McClesky had been convicted of child molestation, also had a business need to know because he was a co-worker and McClesky's sudden departure had a significant impact on his workload.¹⁰⁶ This communication was made in a private room, and the co-worker was told that the information was confidential.¹⁰⁷ Despite the fact that this court shielded the employer from liability, a more prudent employer would have simply told the co-worker that McClesky had been terminated for cause, without elaborating on the reasons.

McClesky had signed a waiver at the time he applied for employment that "release[d] Home Depot and/or its agents and any person or entity, which provides information . . . from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the . . . referenced sources used."¹⁰⁸ McClesky argued that the court should not enforce the release because the employer was grossly negligent and acted with malice.¹⁰⁹ The trial court awarded summary judgment to the employer, and the state court of appeals affirmed, ruling that the employer's behavior did not meet the standard for gross negligence or malice, and that the communication with the co-worker was privileged.¹¹⁰

Similarly, a part-time security officer at the Great Falls International Airport who was dismissed when a background check revealed an arrest for criminal nonsupport was unable to get his case before a jury. In *Barr v. Great Falls Int'l*

103. *Id.* at 619.

104. *Id.*

105. *Id.*

106. *Id.* at 620.

107. *Id.*

108. *Id.* at 618.

109. *Id.* at 619.

110. Communications subject to a privilege will not create liability on the part of the communicator. In this case, the court, although not specifying the type of privilege, appeared to refer to the "common interest" privilege, as described in Section 596 of the Restatement (Second) of Torts. *Id.* at 621; RESTATEMENT (SECOND) OF TORTS § 596 (1977). The court cited *Jones v. J.C. Penney Co.*, noting that "a qualified privilege also exists in those cases involving an employer's disclosure of the reasons concerning an employee discharge to fellow employees 'where the disclosure is limited to those employees who have a need to know by virtue of the nature of their duties (such as supervisors, management officials, . . . etc.) and those employees who are otherwise directly affected . . . by the discharged employee's termination.'" *McClesky*, 612 S.E.2d at 621 (quoting *Jones v. J.C. Penney Co.*, 297 S.E.2d 339, 340 (Ga. Ct. App. 2005)).

Airport Auth.,¹¹¹ Barr, the plaintiff, alleged a variety of tort claims, including invasion of privacy, negligence and negligence per se, and civil rights claims.¹¹² He also alleged that the employer breached the federal Privacy Act,¹¹³ which protects the privacy of confidential criminal information, as well as state law regarding the treatment of confidential criminal information.¹¹⁴

The court ruled that Barr's arrest was public information, and thus federal and state privacy laws regarding confidential criminal information did not apply.¹¹⁵ With respect to Barr's common law breach of privacy claim, the court ruled that Barr had no expectation of privacy in a public arrest record, even one that was thirty years old.¹¹⁶ And with respect to his negligence claim, the court ruled that the employer had no duty to limit disclosure of Barr's arrest, because it was public information.¹¹⁷

The court in *Barr* did not discuss the lawfulness of using arrest records in cases in which no conviction ensued to deny an individual employment or to dismiss an individual. In Barr's case, the fact that he was a security officer could justify the use of arrest records even if no conviction ensued. For most positions, however, both federal and state law generally forbid the use of arrest records alone unless the position is one involving public safety, as was the case in *Barr*. The Equal Employment Opportunity Commission has taken the position that the use of arrest records, when there has been no conviction, has a disparate impact on non-whites, who tend to be arrested, but not convicted, at a rate higher than that of white individuals.¹¹⁸ The federal courts have agreed.¹¹⁹ The laws of some states forbid using arrest records for crimes for which the candidate has not been convicted to deny an individual employment.¹²⁰ For example, Massachusetts law prohibits

111. 107 P.3d 471 (Mont. 2005).

112. *Id.* at 474.

113. National Crime Prevention Policy Compact (Privacy Act), 5 U.S.C. § 552(a) (2002).

114. *Barr*, 107 P.3d at 474.

115. *Id.* at 475.

116. *Id.* at 476.

117. *Id.* at 477.

118. The EEOC *Compliance Manual* states that the use of arrest records to make employment decisions may lead to disparate impact claims on the basis of race. "[W]hen a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow-up inquiries necessary to evaluate his/her credibility." *Section 15: Race & Color Discrimination*, 2 EEOC Compl. Man. (BNA) N. 331, at 60 (Apr. 4, 2006). See *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC Policy Guidance No. N-915-061 (1990). See also John L. Sarratt, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165 (1970).

119. See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970).

120. See, e.g., CAL. LAB. CODE § 432.7 (West 2003 & Supp. 2006); CONN. GEN. STAT. § 31-51i (West 2003); HAW. REV. STAT. § 378-2.5 (LexisNexis 2004 & Supp. 2005); 775 ILL. COMP. STAT. 5/2-103 (West 2001 & Supp. 2006); MASS. GEN. LAWS ch. 151B, § 4 (LexisNexis 1999 & Supp. 2006); N.Y. EXEC. LAW § 296(16) (McKinney 2006); OR. REV. STAT. § 181.555 (2005); R.I. GEN. LAWS § 28-5-7 (2003); WIS. STAT. § 111.335 (West 2002). See also Daniel L.

employers from inquiring into an applicant's arrests or detentions in situations in which no conviction resulted, as well as first convictions for drunkenness, simple assault, speeding, minor traffic violations, or disturbing the peace.¹²¹ Furthermore, under Massachusetts law, a sealed record is treated as though the individual had no criminal record.¹²² New York law requires written notice if a negative employment decision is related to a conviction.¹²³

C. Lawsuits by Third Parties

In addition to lawsuits by applicants or employees challenging the use of background checks, employers face the possibility of lawsuits brought by individuals who claim to have been harmed by an employee, and assert that had the employer conducted a reasonable background check, the harm would not have occurred. The most frequent legal claim is that of negligent hiring, in which a party physically or financially harmed by an employee sues the employer; claims of negligent retention or supervision often accompany negligent hiring claims. Under these tort theories, the employer may be held directly liable for his or her failure to use reasonable care in hiring an individual that the employer knew, or should have known, was unfit for the position.¹²⁴ The tort of negligent hiring differs from the doctrine of *respondeat superior*¹²⁵ in that the employer may be found liable for the tortious behavior of its employee even if the employee is not acting within the scope of his or her employment, while a plaintiff must demonstrate that the employee was acting within the scope of his or her job in order to prevail under a *respondeat superior* theory.¹²⁶ Because the injuries to individuals in these cases are typically not considered to be within the scope of the injuring party's employment, victims of physical violence or fraud tend to bring negligence claims instead.

Although negligent hiring cases are very fact-sensitive, and thus difficult to characterize in a general way, plaintiffs in such cases typically assert that the employer has breached a duty not to expose one or more third parties to a dangerous or incompetent employee. The plaintiff alleges that the employer breached this duty by not exercising reasonable care in hiring the employee, either

Solove & Chris J. Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357 (2006) (proposing a federal Model Privacy Regime to supplement current federal privacy laws, particularly with respect to commercial data brokers).

121. MASS. ANN. LAWS, ch. 151B, § 4(9) (LexisNexis 1999 & Supp. 2006).

122. MASS. ANN. LAWS, ch. 276, § 100A (LexisNexis 2002). See also COLO. REV. STAT. § 24-72-308(f) (West 2001 & Supp. 2005); VA. CODE ANN. § 19.2-392.4 (2004). For a review of state laws limiting the use of prior criminal activity in evaluating an applicant for employment, see Wendell V. Courtney & Matthew T. Rogers, Presentation, Checking New Hires at the Door, NACUA 45th Annual Conference (June 2005).

123. N.Y. CORRECT. LAW § 754 (West 2003).

124. For a discussion of the negligent hiring doctrine, see Michael A. Gamboli, *Negligent Hiring—Caveat Employer*, 44 R.I. B. J. 13 (Nov. 1995).

125. For a discussion of *respondeat superior*, or vicarious liability, see WILLIAM J. PROSSER, *LAW OF TORTS* 458-67 (West Publishing Company 4th ed., 1971).

126. Gamboli, *supra* note 124, at 13 (citing DiCosala v. Kay, 450 A.2d 508 (N.J. 1982)).

because the employer did not conduct a background check or because the background check was incomplete or inadequate. The plaintiff must also prove that the harm incurred was proximately caused by the employer's decision to hire the employee (sometimes referred to as the "nexus").

In *Blair v. Defender Servs., Inc.*,¹²⁷ a college student was assaulted by a custodian who was employed by a janitorial service pursuant to a contract between it and Virginia Polytechnic Institute and State University. The student sued the janitorial service for negligent hiring, negligent supervision, and negligent retention.¹²⁸ The contract required the janitorial service to perform background checks on all of its employees assigned to work at the University.¹²⁹ The employer had not performed a background check on the assailant, against whom a protective order had been issued in a nearby county for a similar assault on a woman.¹³⁰ Had the janitorial service conducted the required background check, it would have discovered the protective order.¹³¹ The student sued the janitorial service, but not the university.¹³² Although the trial court had awarded summary judgment to the janitorial service on the plaintiff's claims of negligent hiring, supervision, and retention, the appellate court reversed the award with respect to the negligent hiring and retention claims.¹³³ Because the university, not the janitorial service, was contractually responsible for supervising the custodian, summary judgment on the negligent supervision claim was affirmed. Similarly, in *Doe v. Garcia*,¹³⁴ a state supreme court reversed a summary judgment award for a medical center. The court ruled that the medical center, which had not conducted a reference check before hiring a hospital employee who later assaulted a patient, could be held liable for negligent hiring; the assailant had been terminated from his previous job for the same misconduct.

A community college that failed to conduct a background check on an instructor was found liable to a student he injured. In *Harrington v. Louisiana State Bd. of Elementary & Secondary Educ.*,¹³⁵ a student enrolled in a culinary apprenticeship program at Delgado College sued the instructor, who was also the program director, and the college's trustees for vicarious liability and negligent hiring, after the instructor raped her.¹³⁶ The instructor had a criminal record for drug violations and theft, and, although the college had checked the validity of his educational credentials, the college had not conducted a background check before hiring him.¹³⁷ The trial court had awarded summary judgment to the school board,

127. 386 F.3d 623 (4th Cir. 2004).

128. *Id.* at 624.

129. *Id.* at 626.

130. *Id.* at 627.

131. *Id.*

132. *Id.* at 630.

133. *Id.* at 628.

134. 961 P.2d 1181 (Idaho 1998), *abrogated by* Hunter v. State, 57 P.3d 755 (Idaho 2002).

135. 714 So. 2d 845 (La. Ct. App. 1998).

136. *Id.* at 852.

137. *Id.* at 850.

asserting that the rape had not occurred in the course of the instructor's employment, as he had taken the student to the home of a friend who owned a restaurant.¹³⁸ The appellate court reversed, ruling that the instructor-student relationship was in effect at the time of the rape, and therefore both the instructor and the school board were liable.¹³⁹

Cases involving physical assaults by individuals who have access to homes provide useful examples of the use of the negligent hiring theory. For example, in *Elliott v. Williams*,¹⁴⁰ a state appellate court reversed an award of summary judgment against a plaintiff who had been assaulted in her apartment by a security guard employed by the defendant landlord. The employer had not performed a background check prior to hiring the guard; had the employer done so, the plaintiff argued, the employer would have discovered that the guard had a criminal record.¹⁴¹ Although the defendant argued that the plaintiff's action of admitting the security guard to her apartment was the proximate cause of her injury, the court ruled that a jury could find that she relied on his position as a security guard to justify admitting him, and that the employer's act of hiring the security guard could be found to be the proximate cause of her injury.¹⁴² In a similar case, *Keibler v. Cramer*,¹⁴³ a trial court found that the employer had a duty to perform a reasonable background check on an employee hired to read gas meters, and that punitive damages could be awarded because the employer's failure to perform a background check could be deemed outrageous.¹⁴⁴ Failure to perform a background check for a position involving access to school-age children has persuaded judges to allow negligent hiring cases to go to a jury.¹⁴⁵ Background checks that are cursory and incomplete may also expose an employer to liability for negligent hiring.¹⁴⁶ The scope of a background check that may be suitable for a simple job that is subject to close supervision is different from the scope of a background check for an individual who is given substantial responsibility, access to vulnerable people or to money, or who has access to individuals' homes because of his or her job responsibilities.¹⁴⁷

138. *Id.* at 847.

139. *Id.* at 852.

140. 807 N.E.2d 506 (Ill. App. Ct. 2004). *See also* Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983).

141. *Id.* at 508.

142. *Id.* at 512.

143. 36 Pa. D. & C.4th 193 (Pa. Ct. C.P. 1998).

144. *Id.* at 200.

145. *See, e.g.*, Mueller v. Cmty. Consol. Sch. Dist. 54, 678 N.E.2d 660 (Ill. App. Ct. 1997). *See also* Harrington, 714 So.2d 845; T.W. v. City of New York, 729 N.Y.S.2d 96 (N.Y. App. Div. 2001).

146. *See, e.g.*, Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984). *See also* Wise v. Complete Staffing Servs., 56 S.W.3d 900 (Tex. App. 2001).

147. *See, e.g.*, Saine v. Comcast Cablevision of Ark., Inc., 126 S.W.3d 339 (Ark. 2003) (affirming summary judgment in favor of employer in case involving a cable installer who assaulted and attempted to murder a homeowner while performing his job in her house where a background check performed by employer found no information to suggest he had a predisposition to violence). *See also* Spencer v. Health Force, Inc., 107 P.3d 504 (N.M. 2005)

On the other hand, if the background check reveals no criminal record, or provides information that is not relevant to the job for which the subject is being considered, the employer may avoid liability for negligent hiring. For example, in *Reed v. Kelly*,¹⁴⁸ a woman who was sexually touched by a security guard sued his employer for negligent hiring. Although the employer had not conducted a background check, the court ruled that there was no nexus between the assailant's prior misconduct (slapping his wife and a fistfight with a coworker) and the harm done to the plaintiff.¹⁴⁹ Even though the employer admitted that it would not have hired the security guard had it known about the prior misconduct, the court affirmed summary judgment for the employer on the negligent hiring claim.¹⁵⁰

Similarly, in *Browne v. SCR Med. Transp.*,¹⁵¹ an employer that did a background check that revealed no criminal convictions could not be liable for negligent hiring of a bus driver who assaulted a developmentally disabled individual.¹⁵² Although the driver had a number of arrests for crimes, he had no record of convictions.¹⁵³ The plaintiff argued that the criminal record check using the assailant's name was insufficient, and that his fingerprints should have been submitted for a more thorough background check.¹⁵⁴ The appellate court affirmed summary judgment for the defendant employer, holding that because the individual had not been convicted of any crimes, even a fingerprint background check would not have revealed relevant information.¹⁵⁵ And in *Southeast Apartments Mgmt., Inc. v. Jackman*,¹⁵⁶ a tenant suing her landlord for negligent hiring did not prevail because the court determined that the landlord had conducted an appropriate reference check on the maintenance supervisor who had attacked the tenant.¹⁵⁷ The employer had collected detailed information on the applicant's background and had spoken with two former supervisors; none of the information gathered by the employer would have put the employer on notice that the employee would attack a tenant.¹⁵⁸

Courts rejecting negligent hiring claims also have done so on the basis that the information collected in the background check did not make actual harm done to the plaintiff foreseeable. For example, in *Moricle v. Pilkington*,¹⁵⁹ a homeowner whose diamond bracelet was stolen by an employee of a plumbing service who was working at her home sued the service for negligent hiring, arguing that the

(reversing summary judgment for employer where failure to conduct criminal background check for home health care worker could constitute negligent hiring).

148. 37 S.W.3d 274 (Mo. Ct. App. 2000).

149. *Id.* at 277.

150. *Id.*

151. 826 N.E.2d 1030 (Ill. App. Ct. 2005).

152. *Id.* at 649.

153. *Id.*

154. *Id.* at 648.

155. *Id.* at 649.

156. 513 S.E.2d 395 (Va. 1999).

157. *Id.* at 397.

158. *Id.* at 398.

159. 462 S.E.2d 531 (N.C. Ct. App. 1995).

employer should have performed a criminal background check on the employee who stole the bracelet. The court disagreed, noting that the employer had conducted a reference check with the employee's previous employer and that no information related to the employee's dishonesty had been communicated.¹⁶⁰ Similarly, when a patient who was assaulted by a health care worker sued the employer for negligent hiring, an appellate court affirmed the trial court's award of summary judgment to the employer, noting that the employer had conducted a background check on the employee and that the check had revealed no prior criminal activity.¹⁶¹

In addition to negligent hiring claims, individuals injured by the actions of an employee have filed claims of negligent retention and/or negligent supervision. In *Saine v. Comcast Cablevision of Arkansas, Inc.*,¹⁶² a plaintiff who was able to demonstrate that the employer was on notice that the employee had behaved in a sexually suggestive way to another customer was able to win reversal of a summary judgment ruling for the employer. The court noted that the possibility that the employer was on notice of this behavior suggested that the subsequent attack on the plaintiff was foreseeable and ruled that her claims of negligent supervision and retention would need to be resolved by a jury.¹⁶³ Similarly, in *T.W. v. City of New York*,¹⁶⁴ the court reversed summary judgment for the employer on the issues of negligent retention and supervision.¹⁶⁵ The court ruled that the employer knew that an employee who sexually assaulted a child had a criminal conviction and that his position as a custodian at the Police Athletic League community center would involve interaction with numerous children.¹⁶⁶ Given the employer's actual knowledge that the employee had a criminal conviction, said the court, the employer should have conducted a background check, which would have demonstrated that the employee had an extensive criminal record.¹⁶⁷ But in *Reed v. Kelly*,¹⁶⁸ the court affirmed summary judgment for the employer on the plaintiff's negligent retention and supervision claims on the grounds that the employee's prior misconduct did not put the employer on notice that the employee would engage in sexual touching and indecent exposure.¹⁶⁹

In a few cases, courts have refused to find employers liable for off-work conduct of employees. In *Guidry v. Nat'l Freight*,¹⁷⁰ a long-haul truck driver assaulted a woman while he was off duty.¹⁷¹ The court ruled that the employer had

160. *Id.* at 607.

161. *Munroe v. Universal Health Serv., Inc.*, 596 S.E.2d 604 (Ga. 2004).

162. 126 S.W.3d 339 (Ark. 2003).

163. *Id.* at 343.

164. 729 N.Y.S.2d 96 (N.Y. App. Div. 2001).

165. *Id.* at 97.

166. *Id.* at 98.

167. *Id.*

168. 37 S.W.3d 274 (Mo. Ct. App. 2001).

169. *Id.* at 277-78.

170. 944 S.W.2d 807 (Tex. App. 1997).

171. *Id.* at 809.

no duty to the victim, that the employer's duty was to hire safe drivers, and that the assault was not foreseeable.¹⁷² Similarly, a Nevada court awarded summary judgment to the employer in a negligent hiring lawsuit against a security service whose employee took a car without permission and injured a passing motorist.¹⁷³ The employer had verified the employee's prior employment, also as a security guard, and a criminal background check had been completed.¹⁷⁴ Neither inquiry indicated that the employee was likely to take a car without permission and to use it to harm another.¹⁷⁵

The litigation demonstrates that employers who conduct background checks on employees who have access to vulnerable individuals may very likely avoid liability when sued by individuals they refused to hire or by individuals harmed by their employees. Courts are sensitive to the relationship between prior criminal conduct and the requirements of the particular job and appear to be requiring that the type of injury was foreseeable before employers will be found liable for the crimes of their employees.

D. The After-acquired Evidence Doctrine

Although challenges by individuals either denied employment or dismissed from employment because of a negative background check are infrequent, such individuals may challenge the negative employment decision using discrimination theories rather than challenging the use of the background check itself. In such cases, if an employer discovers negative information about a job candidate or employee after the negative decision is made, the employer may be able to use the "after acquired evidence" doctrine to defend against a discrimination claim.

This doctrine was established by a decision of the U.S. Supreme Court in *McKennon v. Nashville Banner Publ'g Co.*,¹⁷⁶ in which a woman who was laid off from her position during a reduction in force sued the employer for age discrimination.¹⁷⁷ Prior to her separation from the company, she had photocopied confidential employer documents.¹⁷⁸ When the employer learned that she had copied the confidential documents, it changed the layoff to a termination for cause and argued that the misconduct precluded the plaintiff's recovery for the alleged age discrimination.¹⁷⁹ Although the trial court awarded summary judgment to the employer on that theory and the appellate court affirmed, the U.S. Supreme Court reversed, ruling that if the plaintiff could demonstrate that age was, in fact, the motive for her layoff, the plaintiff could prevail and could be awarded back pay damages up until the date on which the employer learned of the misconduct.¹⁸⁰

172. *Id.* at 811–12.

173. *Burnett v. C.B.A. Security Serv., Inc.*, 820 P.2d 750 (Nev. 1991).

174. *Id.* at 752.

175. *Id.*

176. 513 U.S. 352 (1995).

177. *Id.* at 882–83.

178. *Id.* at 883.

179. *Id.*

180. *Id.* at 886.

McKennon will not help an employer obtain a summary judgment ruling if an individual is able to marshal some evidence of discrimination. The case does, however, suggest that an employer who refused to hire a candidate, or who dismissed an employee, for subjective reasons that could suggest discrimination, but who later discovered resume fraud or found criminal behavior as a result of a background check, could limit backpay liability.

The conflict between the privacy rights of job applicants and employees, on the one hand, and the potential for harm that may be borne by innocent third parties on the other, creates a dilemma for employers. It appears, however, that applicants or employees seldom challenge the results of background checks or an employer's decision based on a negative background check. And even though not all negligent hiring cases result in a victory for plaintiffs, the negative publicity and expense of litigating these claims is substantial. For these reasons, some colleges and universities have implemented background check policies for staff, and in some cases, for faculty as well.

III. POLICY CONSIDERATIONS IN CONDUCTING BACKGROUND CHECKS

Although risk management and public relations considerations, among others, suggest that conducting background checks on employees is a wise idea, the subject is controversial on campuses. Background checks require the candidate to divulge private information that he or she may not wish the employer to know, and which the candidate may believe is marginally relevant or irrelevant to the position.¹⁸¹ Additionally, thorough background checks can be expensive. One source estimates that a criminal background check limited to one state would cost a minimum of \$200.¹⁸² Checks in multiple states or the collection of additional information would increase the price accordingly. Even the best criminal background check may not identify all criminal activity, since the National Criminal File does not include criminal records from all states, is only updated every six months, and contains primarily records of individuals who were incarcerated in prisons, but not in jails.¹⁸³ Attempts to reduce the cost of conducting background checks by using inexpensive online services may result in incomplete or otherwise erroneous background checks.¹⁸⁴

Information on prior criminal misconduct is not the only information that may be difficult to obtain. Former employers of the candidate may be reluctant to share information on job performance or behavior problems, fearing defamation or

181. For resources on privacy issues in background checks, and information for both applicants and employers, see PRIVACY RIGHTS CLEARINGHOUSE, BACKGROUND CHECKS & OTHER WORKPLACE PRIVACY RESOURCES, <http://www.privacyrights.org/workplace.htm> (last visited Sept. 27, 2006).

182. Greg Burns, *Holes Found in Cheap Background Checks*, CHI. TRIB., April 11, 2004, at 13.

183. Lynn Peterson, *Not All Criminal Records Checks are Created Equal*, THE VIRTUAL CHASE, 2005, http://www.virtualchase.com/articles/criminal_checks.html (last visited Sept. 27, 2006).

184. *See id.* *See also* Burns, *supra* note 182.

invasion of privacy lawsuits,¹⁸⁵ despite the fact that many states have enacted legislation providing some form of immunity from liability from defamation claims by former employees if former employers provide truthful information in good faith.¹⁸⁶ Even if state law protects an employer from ultimate liability for defamation when providing a reference, the law cannot prevent defamation lawsuits from being filed.

Institutions considering adopting a background check policy will need to consider a variety of issues. Several of these issues are discussed below.

A. Which Jobs Will Be Included?

Some colleges and universities conduct background checks on candidates for all positions, including faculty positions. The scope of the background check may depend on whether the position involves access to vulnerable populations, money, or institutional vehicles. For example, the University of Arizona policy includes “all temporary and regular appointed and classified new hires,” and requires the verification of “academic credentials, relevant licenses or certifications, work history and job performance.”¹⁸⁷ James Madison University (Virginia) also conducts background checks on all employees, including criminal records checks for all full-time and part-time employees.¹⁸⁸ At other institutions, only applicants for selected positions that are safety- or security-sensitive are required to undergo background checks.¹⁸⁹ At still other institutions, all staff must undergo a

185. See, e.g., Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their 'No Comment' Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381 (1996); John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117 (2004); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir) Rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123 (1992).

186. See N.M. Stat. § 50-12-1 (1995) (“When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee’s job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.”). See also FLA. STAT. ANN. § 768.095 (West 2005); HAW. REV. STAT. ANN. § 663-1.95 (LexisNexis 1995); IND. CODE ANN. § 22-5-3-1 (LexisNexis 2005); LA. REV. STAT. § 23.291 (1999); N.D. CENT. CODE § 14-02-05 (2005); Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent But Irrelevant*, 11 CORNELL J. L. & PUB. POL’Y 1 (2001) (stating as of January 2001, 36 states have enacted statutes providing immunity to employers who provide references for former employees).

187. Overview of University of Arizona Pre-Employment Screening and Background Checking Procedures, University of Arizona, http://www.hr.arizona.edu/02_sel/preEmpScreenOverview.php (last visited Sept. 19, 2006).

188. Policy 1321, Criminal History Investigation, James Madison University, <http://www.jmu.edu/JMUpolicy/1321.shtml> (last visited Sept. 19, 2006).

189. See, e.g., Employment Checking Procedures, Oklahoma State University (Feb. 2003), available at http://www.nacua.org/documents/oklahomasu_bckgrmdchk.htm. See also Background Checks, H.R. 2005-10, Office of the Chancellor, California State University (Mar. 1, 2005) (on file with author). The California State University policy lists examples of positions for which a background check is required, including individuals who are responsible for the care, safety and security of people or property; individuals with access to financial information or cash,

background check before being hired, but faculty do not.¹⁹⁰ In addition to determining which applicants for employment should be subject to background checks, institutions should consider whether certain volunteers, such as unpaid athletics coaches, or individuals who volunteer at university hospitals, day care centers, or other units with vulnerable populations, should undergo background checks as well. And finally, if the institution is using temporary or contract employees, or outsources certain functions, the employer should ensure that the firm supplying the employees conducts appropriate background checks if the institution does not perform this function itself.

B. What Kind of Information Should Be Collected?

Another important issue to be resolved is the type of information to be collected about an applicant. It would seem to be important to verify any educational credential that the individual claims, but seeking other types of information may appear to raise larger privacy issues. Is a review of the individual's criminal record necessary for all positions? Is a credit check necessary for those positions where the employee will not have access to institutional funds, procurement approval, corporate credit cards, or personally-identifiable information? Should prior work history be verified, and an evaluation of the individual's performance in prior jobs be made?¹⁹¹ The answer to these questions may differ depending on the position, or the institution may decide to perform a criminal background and credit check on all applicants.¹⁹²

And if the institution decides to conduct a criminal background check, how can

credit cards, or checks; individuals who can commit institutional funds; individuals who exercise control over the institution's business processes (as well as those with access to business systems); individuals with access to personally identifiable information about students, faculty, staff or alumni; individuals with access to controlled substances; and individuals who possess master or sub-master keys to the institution's buildings. *Id.*

190. See, e.g., Important Information for Final Candidates, Rowan University (N.J.) (on file with author).

191. As discussed earlier, reference checking by a prospective employer may be difficult if the former employer refuses to divulge information beyond verifying the individual's length of service and job title. For a discussion of the legal issues in seeking and providing employment references, see Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991).

192. Experts recommend using "routine" background checks for positions that are not safety-sensitive or do not involve access to funds, sensitive data, etc., and using "special" background checks for positions where a criminal background is more problematic because of the nature of the position. "Routine" background checks may include a credit check, a check by telephone of employment references, a criminal records check, a check of the candidate's driving record for the past three years, verification of educational credentials, verification of home address and telephone number, and verification of Social Security number. A "special" background check would include all of the elements of a "routine" check plus a check of bankruptcy filings, a civil filings search, verification of employment history, personal interviews with employment and other references, interviews with previous employers, property checks, residence checks, and a fingerprint check. Peter C. Hammes, Gordon R. Steele & Kenneth R. van Wyk, Corporate Risk Management, in KEVIN P. CRONIN & RONALD N. WEIKERS, DATA SECURITY & PRIVACY LAW: COMBATING CYBERTHREATS § 5.37 (Thompson/West 2002).

it be confident that the check has identified all relevant criminal misconduct? Experts say that the “best” criminal background check involves having an individual visit the courthouse in each county in which the candidate lived to check the criminal records.¹⁹³ Using the online sex offender registries for each state in which the candidate lived may not unearth all relevant information, because different states may call the same act by a different name, and sex offender registries may not be up to date.¹⁹⁴ If a candidate’s criminal record has been expunged, it may not appear on a background check.¹⁹⁵

Administrators and counsel will need to decide how extensive they wish background checks to be, and for which jobs they will use the most far-reaching (and thus the most expensive and potentially invasive of privacy rights) background checks. And, since it may not be possible to be completely certain that the background check has uncovered every relevant fact about the candidate, careful monitoring and supervision of employees in sensitive positions will also be necessary.

C. Who Should Conduct the Background Check?

As noted above,¹⁹⁶ employers that use an external “consumer reporting agency” to conduct background checks must comply with the Fair Credit Reporting Act. Although verifying degrees, checking employment references, and verifying prior work history can be done in-house, most states do not allow employers direct access to criminal records, and an external organization is frequently used to conduct these checks. Consumer credit agencies may be used to conduct credit checks of applicants or employees. In addition to the dictates of the Fair Credit Reporting Act, some states, such as California, require that an individual be notified that a background check is being performed, and be given a copy of the ensuing report.¹⁹⁷

D. How Should Negative Information Be Evaluated and Who Should Do the Evaluation?

Institutions conducting background checks need to develop criteria for evaluating any negative information that they receive about an applicant or current employee. How relevant is the information to the job that the individual is or will be doing? How long ago did any criminal or other misconduct occur? What was the nature of the offense? How old was the individual when the crime or other misconduct occurred? Can the individual be viewed as rehabilitated, or has subsequent misconduct occurred? If there have been arrests but no convictions, should these arrests be taken into consideration at all?

193. Peterson, *supra* note 183.

194. See, e.g., Darkness to Light, Using Registry of Sex Offenders Requires Caution, http://www.darkness2light.org/news/archives/news_03_16_00.asp (last visited Sept. 20, 2006).

195. See *supra* note 66 and accompanying text.

196. See *supra* notes 44–51 and accompanying text discussing the Fair Credit Reporting Act.

197. See, e.g., *supra* note 43 (discussing relevant laws).

In addition to developing criteria for evaluating the results of a background check, colleges and universities need to decide who will be authorized to review the information. For example, at James Madison University, the Human Resources Department receives the information and contacts the recruiting department if negative information is obtained. A decision to hire an applicant with a job-related conviction requires the approval of the vice president.¹⁹⁸ Given the confidential nature of much of the information that may be elicited by a background check, institutions should limit the number of individuals who have access to the information and should develop policies to protect applicants from inappropriate or unnecessary disclosure of this information.

E. Special Issues Relating To Faculty

Although faculty are among those individuals whose false credentials or prior criminal conduct have resulted in their discharge, in embarrassment, and in some cases, legal liability for their institutions, many faculty are deeply suspicious of the use of background checks for applicants for faculty positions. Although the verification of an applicant's college degrees and prior work experience, as well as conversations with a candidate's current and former colleagues concerning the quality of that individual's teaching, service, and collegiality, are not an issue for most faculty,¹⁹⁹ many oppose the use of criminal background checks for faculty positions.²⁰⁰

The American Association of University Professors has issued a report²⁰¹ that opposes criminal background checks for faculty positions but recommends that, if such policies are implemented, the provisions of the Fair Credit Reporting Act²⁰² be followed, regardless of whether the institution conducts its own background

198. *Supra* note 188.

199. American Association of University Professors (AAUP) Verification and Trust: Background Investigations Preceding Faculty Appointment, *available at* <http://www.aaup.org/statements/REPORTS/background.htm> (last visited Sept. 19, 2006). The report approves of search committees making:

thorough checks of a candidate's references and of interviewing a candidate's present and former colleagues. . . . [S]earch committees also check educational credentials, prior employment, professional experience, and the like. No doubt such reference checks entail some compromise of the privacy of candidates, but it is justified in light of reasonable institutional needs.

Id. at 2.

200. *Id.* Academic administrators may also oppose the use of criminal background checks for faculty on the grounds that such investigations might offend a sought-after candidate for an important faculty position. *See, e.g.,* Scott Smallwood, *Should Colleges Check up on Professors?*, CHRON. HIGHER EDUC., Sept. 12, 2003, at A12 (quoting President of Emory University as saying "I believe they [the faculty] feel it would be an incursion on their privacy, and that they would argue convincingly that the checking done in the faculty-hiring process is so thorough that the risk is minimal"). The University of Texas implemented a policy of background checks for new faculty hires, but rescinded it, while the University of Montana conducts criminal background checks on all individuals offered a position, including faculty. *Id.*

201. *See supra* note 199.

202. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000).

checks or uses a third party. The report also recommends discarding all background check information except information relevant to the candidate who was hired.²⁰³ It also recommends that any inaccuracies in the report be corrected before the report is placed in the faculty member's personnel file or segregated in a confidential file with limited access.²⁰⁴

Other issues related to the use of background check information regarding faculty are the same as those discussed with respect to the use of such information for any employee.²⁰⁵ In addition, colleges and universities developing background check policies for faculty should consider the fact that, for most faculty hires, search committees are used to recruit, screen, and recommend candidates for faculty positions. Should the search committee verify candidates' degrees and former employment? Should a criminal background check be done? If so, how much and what kind of information should the search committee be given about the contents of the background check? And if search committee members are given background check information, what guidelines should the search committee be given to evaluate the relevance of certain criminal or civil legal records (such as a prior bankruptcy, previous drug offenses, etc.)?

With respect to candidates for faculty positions, the college or university should consider the rights of the candidate as well as its own concerns. Will the candidate be given a copy of the information elicited during the background check? Will that individual be given an opportunity to challenge allegedly incorrect or misleading information, or to explain certain items in the report? Answers to all of these questions will differ depending upon state law limitations on the use of criminal background checks, institutional culture, and the college or university's own history of problems with employees who had undisclosed criminal convictions or fraudulent credentials.

IV. CONCLUSION

Faculty, administrators, and counsel should consider the issue of using background checks carefully to ascertain whether individuals who claim to have earned degrees, to have a particular kind of work experience, and not to have a criminal record are, in fact, who they say they are. Verifying this information is an important risk management strategy; it is also an important indicator of institutional accountability.

But implementing a system of background checks requires thoughtful planning and decisions about which positions will involve background checks, the thoroughness of the check, the process for notifying the candidate about the check and providing any information that is relied upon in making the hiring decision, the way that negative information will be evaluated, and the reliability of the individual(s) or organization(s) used to conduct the background checks. In the end, one wonders whether the best that a background check can offer is a defense

203. *Id.* at 113.

204. *Id.* at 114.

205. *See supra* note 198 and accompanying text.

to potential liability for tort claims filed by individuals injured by a college or university employee. Although protection against legal liability is an important risk management strategy, background checks should help colleges and universities be more confident about the integrity of the individuals they hire. Academic communities function, in many respects, on the basis of trust; verifying the applicants' background information helps ensure, but cannot guarantee, that that trust is earned.

THE P2P FILE SHARING WAR AFTER *GROKSTER*: IT FEELS LIKE BELGIUM OVER HERE

DAVID HARRISON*

*“The court finds that Napster use is likely to reduce CD purchases by college [and university] students, whom defendant admits constitute a key demographic.”*¹

INTRODUCTION

As the battles escalate in the file sharing war, college and university campuses are increasingly becoming the unwilling battlegrounds. The content community continues to sue its customers,² and the institution’s role as an Internet Service Provider (“ISP”) makes it impossible to avoid being a participant in the battles. As long as the content community believes that students are their key demographic, and also believes that those same students are destroying their business, much of the war will be fought on college and university soil.³ Metallica began the battle directly against higher education institutions,⁴ and if suits directly against students fail to reduce file sharing, Congress and the courts may find the perfect reason to remove copyright safe harbors and sovereign immunity for intellectual property infringement from colleges and universities.

It is very easy to become an intellectual property communist; Napster

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1. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 909 (N.D. Cal. 2000).

2. See EFF (Electronic Frontier Foundation): *RIAA v. The People*, <http://www.eff.org/IP/P2P/riaa-v-thepeople.php> (last visited Aug. 30, 2006); see also ELECTRONIC FRONTIER FOUNDATION, *RIAA V. THE PEOPLE: TWO YEARS LATER* (2005), http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf.

3. Although, there is a serious debate as to whether file sharing has any effect upon record sales: “Downloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates. Moreover, these estimates are of moderate economic significance and are inconsistent with claims that file sharing is the primary reason for the recent decline in music sales.” Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (Mar. 2004) (unpublished manuscript), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

4. See Scott Carlson, *Metallica Sues Universities and Napster, Charging That Students Engage in Music Piracy*, CHRON. OF HIGHER EDUC., Apr. 28, 2000, at A50.

demonstrated this, and there is no question that campuses are a source of copyright infringement problems, which need to be continuously addressed. Perhaps, some of the problems of peer-to-peer (P2P) copyright infringement arise from the fact that the laws are counter-intuitive—that we can “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ But, it is more likely that the arguments about infringement are the result of technological convenience and perceptions of ownership, rather than constitutional debate. College and university students downloading digital files are perceived as pirates and thieves by the content industry, while the students perceive the recording industry as greedy philistines, and thus ignore intellectual property rights. Both sides push the concept of “ownership” to its polar limits. This has created a powerful argument, fueled by the convenience of the technology and fanned by litigation and congressional action. But, argument is the lifeblood of the academy, and this time it is over the stock-in-trade of the academy—intellectual property.

As institutions of higher education, we have our own responsibilities in this argument that are not completely parallel to those of the Recording Industry Association of America (“RIAA”), the Motion Picture Association of America (“MPAA”), and the content community, but we must share many of their concerns, because they implicate the creation of intellectual property and respect for the intellectual property of others. P2P technology and file sharing have created enormous burdens on the information technology infrastructure, causing rising costs and diminished capacity for “legitimate” uses, as well as diminishing respect by the file sharing combatants for intellectual property. Thus, our interests are not parallel to file sharers either—although we share their concerns for the continuation of the technology and its legitimate uses. But, this balance has inherent risks. Courts and Congress are expanding protections for copyright holders and our position as ISP moves private institutions closer to application of contributory and vicarious infringement theories, and public institutions put their sovereign immunity at risk.

Higher education must react to the changes in technology and the changes in laws in very technical ways, but our starting place should be grounded in basic, fundamental questions, and with a goal to foster our academic purposes. The new technologies have not outpaced the philosophical questions—they have opened the door for the timeless questioning the academy holds most dear.

The consequences are serious. Each individual act of copyright infringement can result in a staggering potential for damages; including injunctions, statutory money damages of \$150,000, compensation for lost profits, liability for the attorney fees of the party claiming infringement, court costs, and even criminal penalties.⁶ Given these potential penalties and sanctions, the issues are worth serious consideration.

This article will discuss the problem, the basic rights of copyright owners, the architecture of P2P technology, the primary defenses to P2P copyright

5. U.S. CONST. art. I, § 8, cl. 8.

6. See 17 U.S.C.A. §§ 501–513 *et seq.* (2006).

infringement, the evolving case law resulting from attempts to stop P2P file sharing, the risks of losing protection under the Digital Millennium Copyright Act (“DMCA”) safe harbor provisions and sovereign immunity, and how institutions are formulating a model response to P2P file sharing and infringement.

THE PROBLEM

While the P2P problem arises from many different sources—both technological and philosophical—much of the problem lies in the impasse of positions that content owners, file sharers, and ISPs have clung to and perpetuated. An admitted oversimplification demonstrates the point:

- Copyright Content Owners: “File sharing is theft and piracy, and we’re fighting our own terrorist war.” [Translation: “We’re losing big money!”]
- File Sharers: “Content Owners are greedy philistines trying to destroy our culture and freedom.” [Translation: “It’s free, all free!”]
- Internet Service Providers in DMCA suits: “The Content Community is engaging in jihads against 12 year old girls!” [Translation: “You are scaring away our customers.”]

Compounding the problem for higher education is the fact that students comprise an extremely important market segment for copyrighted materials, and yet they have some of the most sophisticated computer networks and bandwidth in the world at their disposal to simply download the materials from P2P networks.⁷ And we are very aware of what is happening on our networks.

All actors in the arena of course, claim the moral high ground. Yet no position is completely free of some complicity. In September 2002, music labels and retailers settled charges in forty-three states for antitrust and price fixing, including \$67.3 million in cash and \$75.7 million in CDs.⁸ It is estimated that 90% of materials on P2P networks are infringing⁹ and up to 60% of higher education bandwidth is devoted to P2P file sharing.¹⁰ The business models of many of the file sharing services were built upon the ability to download materials from major artists and studios, without cost, and the services have intentionally distanced themselves from traditional copyright infringement liability. ISPs and computer manufacturers actively promote the downloading and copying abilities of their

7. However, the legitimate download market continues to grow, with iTunes reporting that one billion songs have been legally downloaded from its iTunes Music Store. See Apple iTunes 1 Billion Songs Milestone, <http://www.apple.com/itunes/1billion/> (last visited Aug. 30, 2006).

8. See Lisa M. Bowman, *Labels Pay to Settle Price-Fixing Suit*, CNET NEWS.COM, Sept. 30, 2002, <http://news.com.com/2100-1023-960183.html>.

9. See *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2789–90 (2005) (Breyer, J., concurring).

10. See *Copyright, Peer-to-Peer File Sharing and DMCA Subpoenas*, NACUANOTES (Nat’l Ass’n of Coll. & Univ. Attorneys, Washington, D.C.), Nov. 6, 2003, http://www.stanford.edu/dept/legal/Worddocs/Peer_to_Peer_FileSharing_Note.pdf; see also P-CUBE, INC., CONTROLLING PEER TO PEER BANDWIDTH CONSUMPTION 4 (2003), http://downloads.lightreading.com/wplib/pcube/controlling_peer_to_peer.pdf.

services and hardware.

The academic culture presents its own difficulties in the P2P debate because of its traditions and missions. Librarians are devoted to the principles of fair use and dissemination of materials. Every work that is copyrighted can be used for fair use, and restrictions on dissemination of those materials are antithetical to the core of academic freedom. It is also the privilege and the duty of faculty and students to embrace all learning interactions, including P2P and its promises, and to push the envelope of knowledge and academic freedom. P2P provides and promises great advances in teaching and learning, but current P2P abuses threaten these goals. Regardless of the perspective, we all have the duty to promote and adhere to ethical and legal behavior in the pursuit of learning, teaching, research, and public service.

THE STARTING POINT

The starting point for copyright is not the idea that a copyright's purpose is to protect a personal property right. The property right is a secondary tool for the primary purpose, which is contained in the United States Constitution: "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹¹ The monopoly is to promote science and the useful arts and to encourage dissemination and works built upon that dissemination.

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.¹²

In addition to the Constitution, copyright is protected by the Copyright Act of 1976.¹³ Other laws can also apply to copyright cases, including the First Amendment,¹⁴ the No Electronic Theft (Net) Act,¹⁵ the Federal Anti-Bootleg Statute,¹⁶ Anti-Trust Laws,¹⁷ and various federal and state criminal and civil laws. The United States also adheres to international treaties on intellectual property, including the World Intellectual Property Organization ("WIPO") treaties.¹⁸ Still, this quilt of laws lags behind the advances in technology.

11. U.S. CONST. art I, § 8, cl. 8.

12. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–350 (1991) (citation omitted).

13. 17 U.S.C.A. §§ 101 *et seq.* (2006).

14. U.S. CONST. amend. I.

15. Pub. L. No. 105–147, 111 Stat. 2678 (1997).

16. 18 U.S.C.A. § 2319A (2006).

17. 15 U.S.C.A. §§ 1 *et seq.* (2006).

18. See World Intellectual Property Organization, WIPO-Administered Treaties, <http://www.wipo.int/treaties/en/> (last visited Aug. 30, 2006).

EXCLUSIVE RIGHTS OF COPYRIGHT OWNERS

The exclusive rights of copyright owners are articulated in 17 U.S.C. § 106.¹⁹ The primary rights at issue in P2P are the rights to reproduce and distribute works. The advances in digital media and technology make reproduction and distribution virtually instantaneous and world wide.

The terms of protection for these rights have been continually extended. While a patent is generally only protected for fourteen to twenty years,²⁰ copyrights last well beyond the life of the author. Works originally created on or after January 1, 1978, are protected for the author's life plus an additional seventy years.²¹ A joint work is protected for seventy years after the last surviving author's death.²² For works made for hire, anonymous and pseudonymous works, the protection is for ninety-five years from publication or 120 years from creation, whichever is shorter.²³

TYPES OF FILE SHARING

File sharing technology has developed from a more traditional client/server communication to a purely independent communication, and understanding the basics of file sharing technology is essential to understanding court decisions. With traditional network technology, individual computers communicate with central servers that control, coordinate, and manage client requests. Communication between individual computers is indirect and the server operates as a central conduit for information transfers. Because this communication slows client/server interaction, and because censorship became a concern, alternative

19. This section, titled "Exclusive rights in copyrighted works," states:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

See 17 U.S.C.A. § 106. In addition, 17 U.S.C. § 106A provides for exclusive rights for attribution and integrity.

20. See 35 U.S.C.A. § 154 (2006); 35 U.S.C.A. § 161 (2006); 35 U.S.C.A. § 173 (2006).

21. 17 U.S.C.A. § 302 (2006).

22. *Id.*

23. *Id.*

methods of communication were developed—P2P communication.²⁴

With hybrid/centralized P2P, the central server performs some but not all of the functions of a traditional central server (e.g., Napster's central server contained directories of the available files). While the central server maintains directories of files and those individual computers allowing access to those files, an individual computer initiates file transfers directly from another individual computer containing the target file. Beyond maintaining the directories, the central server does not take part in the file transfer.

With pure P2P technology, such as Morpheus, each individual computer operates independent of a centralized server. Information transfers are autonomous by use of software programs that facilitate all searches, connections, and transfers.

PRIMARY DEFENSES TO P2P COPYRIGHT INFRINGEMENT

Although the defenses that have been advanced in P2P cases have ranged from the First Amendment to antitrust to technicalities of the Copyright Act of 1976, the primary defenses remain fair use, the DMCA²⁵ safe harbors for ISPs, and the *Sony*²⁶ defense for technology capable of substantial noninfringing use.²⁷

Fair use has been codified, although not completely or exclusively, in 17 U.S.C. § 107.²⁸ In essence, every copyrightable work may be used without

24. See Ian Clarke, Division of Informatics, Univ. of Edinburgh, A Distributed Decentralised Information Storage and Retrieval System (1999) (unpublished manuscript), <http://gnunet.org/papers/freenet.pdf>.

25. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

26. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding that manufacturers of home video recording machines could not be liable for contributory infringement for potential misuse by its purchasers because the devices were sold for legitimate purposes and had substantial non-infringing uses).

27. The three basic methods of copyright infringement are:

A. Direct Infringement

1. Plaintiff owns the work infringed;
2. Infringer violated at least one of the exclusive rights under 17 U.S.C. § 106, e.g., reproduction and distribution.

B. Contributory Infringement

1. Direct infringement by another;
2. Actual knowledge of the direct infringement or constructive knowledge of infringement by the facts and circumstances;
3. Induced, caused, or materially contributed to the underlying direct infringement.

C. Vicarious Infringement

1. Direct infringement by another;
2. Right and ability to control or supervise the direct infringement;
3. Vicarious infringer derived a direct financial benefit from underlying infringement.

28. The Copyright Act of 1976 codifies the fair use doctrine, stating:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other

permission if the user favorably weighs the four fair use factors: purpose and character of the use; nature of the work; amount and substantiality of the portion; and the effect upon the potential market for the work. A relatively clear fair use case may be made for a music composition student's download of a copyrighted song from a P2P network, if the purpose is scholarly analysis. Fair use is far less clear when an engineering student downloads a song for contemplation, and fair use is a very difficult argument when any student downloads a song purely for entertainment.

The DCMA ("the Act") was signed into law on October 28, 1998.²⁹ The legislation was the result of two WIPO treaties, which the United States joined. The Act addressed various copyright issues, directed certain studies, and created innovations in copyright protection. Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act, creates four new limitations on liability for copyright infringement by online service providers.³⁰ The limitations are based on four categories of conduct by a service provider: transitory communications; system caching; storage of information on systems or networks at direction of users; and information location tools. Each limitation provides a complete bar to monetary damages, and restricts the availability of injunctive relief in various

means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

29. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). *See also* U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 U.S. COPYRIGHT OFFICE SUMMARY (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>. In order to take advantage of the DMCA safe harbors, one must develop a policy for handling infringement complaints, provide education on copyright ownership and infringement, place a written policy and procedure notice on the Web, and register an agent with the United States Copyright Office. *Id.* These are not onerous provisions and the protections offered are well worth the investment. Moreover, adherence to these requirements enhances the probability of reducing infringement through education and behavior modification. The Act addressed various copyright issues, directed certain studies, and created innovations in copyright protection. The DMCA also, arguably, failed to address important issues in distance education, but that failing is not at issue here. Four of the five titles which comprise the DMCA implement provisions for copyright-related issues concerning, for example, ephemeral digital recordings, Webcasting of music, and the Vessel Hull Design Protection Act. *See* Digital Millennium Copyright Act §§ 401-407 & §§ 501-505. Title II, with its limitations on liability, is the only section of the DMCA addressed in this article.

30. 17 U.S.C.A. § 512 (2006).

respects. Section 512 also includes special rules concerning the application of these limitations to nonprofit educational institutions.³¹

While there is a continuing debate whether a state agency can lose immunity from liability for copyright infringement under the Eleventh Amendment, Congress has specifically attempted to make a state entity liable. The complete bar to money damages and most other relief for copyright infringement in the DMCA is an extraordinary measure—especially when the bar is in response to an actual act of infringement—which would normally be considered under theories of vicarious liability or contributory liability, under which an institution or entity could be held liable for actions it was not party to or even aware of.

In addition to limiting the liability of service providers, Title II of the DMCA establishes a procedure by which a copyright owner can obtain a subpoena from a federal court clerk ordering a service provider to disclose the identity of a subscriber who is allegedly engaging in infringing activities.³² These subpoenas are a separate battle in the P2P war and discussed further below.

In *Sony Corp. of America v. Universal City Studios, Inc.*,³³ the sale of home videotape recorders was challenged on the grounds of contributory infringement. The U.S. Supreme Court rejected liability, borrowing the “staple article or commodity of commerce”³⁴ doctrine from patent law, and holding that contributory infringement could not extend to the manufacturer of a device that was capable of substantial noninfringing uses:

[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

. . . The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the

31. Section 512(e) determines when the actions or knowledge of a faculty member or graduate student employee who is performing a teaching or research function may affect the eligibility of a nonprofit educational institution for one of the four limitations on liability. As to the limitations for transitory communications or system caching, the faculty member or student shall be considered a “person other than the institution,” so as to avoid disqualifying the institution from eligibility. As to the other limitations, the knowledge or awareness of the faculty member or student will not be attributed to the institution. 17 U.S.C.A. § 512(e). The following conditions must be met: (1) the faculty member or graduate student’s infringing activities do not involve providing online access to course materials that were required or recommended during the past three years; (2) the institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing; and (3) the institution provides all of its users with informational materials describing and promoting compliance with copyright law. *See id.* *See also* David Lombard Harrison, *Safe Harbors for Educational Institutions In The Digital Millennium Copyright Act*, <http://www.northcarolina.edu/content.php/legal/dmca/index.htm> (last visited Aug. 30, 2006) (giving additional information on creation and compliance with DMCA safe harbors).

32. 17 U.S.C.A. § 512(h) (2006).

33. *Sony Corp.*, 464 U.S. 417.

34. 35 U.S.C.A. § 271 (2006).

machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home.³⁵

Ironically, while the Betamax format could only play or record up to one hour, the VHS extended-play format revolutionized home entertainment and rewarded the opponents of home tape machines beyond even their expectations.

LITIGATION AGAINST FILE SHARING SYSTEMS

Faced with the prospect of suing virtually 10,000 individual file sharers a second, given the growing popularity of online file sharing, or trying to stop the vehicle for infringement in one action, the content community naturally chose the later course of action. The “it’s too good to be true” suspicion became reality for legal file sharers as others used the medium for copyright infringement.

Napster³⁶

Napster put file sharing directly in the judicial crosshairs. The district court put the issue, as it saw it, fairly succinctly: “The matter before the court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings.”³⁷ Napster distributed free software that allowed users to log on to the Napster system and share MP3 files with other users who were logged on. The court found that 10,000 music files were shared per second and Napster projected seventy-five million users by the end of 2000.³⁸ Napster collected no revenues for its services and software—hoping to reach a critical mass of users and music to enable it to “monetize” the services in the future.³⁹ The Napster service comprised of a cluster of servers and a central server that contained directories of users and files. Once a desired file was found, the actual file was transferred directly between two users—operating a hybrid P2P system.⁴⁰

While the Court of Appeals for the Ninth Circuit was not quite as single-minded as the district court in shutting down Napster, it did affirm the injunction that effectively closed the doors at Napster.⁴¹ Napster’s primary defenses were

35. *Sony Corp.*, 464 U.S. at 442.

36. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

37. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

38. *Id.* at 902.

39. *Id.*

40. *Id.* at 905–07.

41. *A&M Records, Inc.*, 239 F.3d at 1027–28.

grounded in fair use, the Audio Home Recording Act⁴² (“AHRA”), and the DMCA.

The court of appeals concluded that Napster users infringed at least two of the copyright holders’ exclusive rights in 17 U.S.C. § 106: the rights of reproduction and distribution.⁴³ Napster asserted the affirmative defense of fair use in response, arguing that sampling, space-shifting, and permissive distribution were all fair uses and not infringement.⁴⁴ The court disagreed after, somewhat simplistically, reviewing the four factors of the fair use analysis.⁴⁵

In reviewing the purpose and character of the use, the court found that the use was not transformative, but was a reproduction of the entire work.⁴⁶ The court also found that the uses were commercial, rather than noncommercial, because “repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”⁴⁷ This factor weighed against fair use. Considering the nature of the use was very simple for the court: the works were creative, and thus, cut against fair use.⁴⁸ In its analysis of the portion used, the court found that copying the entire work militated against a finding of fair use.⁴⁹ The final factor, the effect of the use on the market, was found to weigh against fair use for two reasons. First, the court accepted the district court’s conclusion that Napster reduced CD sales to college and university students, and second, it raised barriers to the plaintiff’s entry into the market for digital downloads.⁵⁰

The court rejected the separate assertion of sampling, even if sampling actually increased sales, because the copyright holder has no obligation to license material.⁵¹ The space-shifting argument was rejected because the copying was not by and for the original user, but was a distribution to the general public.⁵² Finding that the uses were not protected by fair use, the court went on to examine contributory and vicarious liability.

Contributory infringement occurs when one who has knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. The court agreed that Napster had both actual and constructive knowledge of direct infringement.⁵³ However, the *Sony* defense can relieve one of liability if it applies. The court recognized that an examination of the application of *Sony* includes a system’s capabilities as well as actual uses, but that if a

42. 17 U.S.C. §§ 1001–10 (1992).

43. *A&M Records, Inc.*, 239 F.3d at 1013–19.

44. *Id.* at 1014.

45. *Id.* at 1015–17.

46. *Id.* at 1015.

47. *Id.*

48. *Id.* at 1016.

49. *Id.*

50. *Id.*

51. *Id.* at 1018.

52. *Id.* at 1019.

53. *Id.* at 1020.

computer operator has knowledge of specific acts of infringement and fails to block or remove the materials, the operator has contributed to the infringement.⁵⁴ Finding sufficient knowledge, the court of appeals agreed with the court below that Napster provided the site and facilities for the users' infringement, and thus, materially contributed to the infringement.⁵⁵

Vicarious copyright infringement extends to cases where the defendant has a right and ability to supervise the infringing activity and also has a direct financial interest in the activity. The financial interest was found because Napster was using infringing materials as a draw for users and future revenue.⁵⁶ The supervision was also found because Napster was a hybrid P2P system with registration, centralized search and index servers, and use agreements.⁵⁷ Thus, Napster had the ability to control its users and the ability to control some of the infringement.

The court rejected the defense under the AHRA, finding that a computer was not a device covered by the Act and also finding that computers do not make digital music recordings as contemplated in the statute.⁵⁸ The DMCA defense was left for the district court to develop at trial.⁵⁹ Additional defenses were also rejected.⁶⁰

It did not take long for Napster to close its doors and keep the case from reaching trial.⁶¹ Yet competitors were willing to fill Napster's space in the ever-growing file sharing market despite the legal issues at stake. The copyright owners went after the new players just as they had with Napster.

Aimster⁶²

Judge Posner took a somewhat different approach in deciding the *Aimster* case, questioning the analysis in *Napster*, but having no trouble finding contributory

54. *Id.* at 1021.

55. *Id.* at 1022.

56. *Id.* at 1023.

57. *Id.*

58. *Id.* at 1025–26.

59. *Id.* at 1025.

60. *Id.* at 1025–27.

61. The district court anticipated the effect of its decision:

Although even a narrow injunction may so fully eviscerate Napster, Inc. as to destroy its user base or make its service technologically infeasible, the business interests of an infringer do not trump a rights holder's entitlement to copyright protection. Nor does defendant's supposed inability to separate infringing and non-infringing elements of its service constitute a valid reason for denying plaintiffs relief or for issuing a stay.

A&M Records, Inc., 114 F. Supp. 2d at 926. The court went even further:

Any destruction of Napster, Inc. by a preliminary injunction is speculative compared to the statistical evidence of massive, unauthorized downloading and uploading of plaintiffs' copyrighted works—as many as 10,000 files per second, by defendant's own admission. The court has every reason to believe that, without a preliminary injunction, these numbers will mushroom as Napster users, and newcomers attracted by the publicity, scramble to obtain as much free music as possible before trial.

Id. (citations omitted).

62. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

infringement. Aimster operated a hybrid P2P service, much like Napster—although the Aimster service was a piggyback to America Online’s instant messaging system.⁶³ The court decided the case in the context of *Sony*, rejecting the RIAA’s argument that *Sony* does not apply to services.⁶⁴ Condensing the competing arguments, the court observed: “To the recording industry, a single known infringing use brands the facilitator as a contributory infringer. To the Aimsters of this world, a single noninfringing use provides complete immunity from liability. Neither is correct.”⁶⁵

The court found that Aimster had the burden of demonstrating substantial noninfringing uses, but even after suggesting possible uses, the court noted that Aimster had failed to produce *any* evidence of noninfringing uses.⁶⁶ Even the tutorial for new users was designed to show how to download copyrighted music. Sidestepping the issue of vicarious liability, the court rejected Aimster’s DMCA defense because it had failed to reasonably prevent repeat infringers—a requirement under the DMCA.⁶⁷

In rejecting Aimster’s argument that the preliminary injunction ran afoul of the First Amendment, the court observed,

Copyright law and the principles of equitable relief are quite complicated enough without the superimposition of First Amendment case law on them; and we have been told recently by the Supreme Court not only that “copyright law contains built-in First Amendment accommodations” but also that, in any event, the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.” Or, we add, to copy, or enable the copying of, other people’s music.⁶⁸

For Judge Posner, the real test for liability was, if there are substantial *infringing* uses, the provider must implement available means to prevent infringement, if the means of prevention are not disproportionately costly.⁶⁹ Cost/benefit analysis in all things.

This was the content community’s second big victory. But, new services kept appearing and they were employing different technology.

Grokster⁷⁰

After the successes in *Napster* and *Aimster*, this case was a surprise to many because the court failed to enjoin filesharing services that had taken over the field. Having successfully destroyed Napster and Aimster, the content community sued

63. *Id.* at 646.

64. *Id.* at 648–49.

65. *Id.* at 651.

66. *Id.* at 653.

67. *Id.* at 655.

68. *Id.* at 656 (quoting *Eldred v. Ashcroft*, 537 U.S. 186 (2003)).

69. *Id.* at 649–50.

70. *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

Grokster, StreamCast, and Kazaa BV, under the same theories of contributory and vicarious copyright infringement.⁷¹ All three marketed free software, built upon the FastTrack P2P technology.⁷² StreamCast later changed its operating software to operate on the open Gnutella technology and created its own software, known as Morpheus. The district court held in favor of the defendants⁷³ and the court of appeals affirmed.⁷⁴

The first task for the court of appeals contributory infringement analysis was to determine whether the defendants' products were capable of substantial or commercially significant noninfringing uses.⁷⁵ If so, then constructive knowledge of infringement could not be imputed and the copyright owners would have to show defendants had reasonable knowledge of specific infringing files.⁷⁶ The court did not constrain itself to current uses, but also looked to other noninfringing uses of defendants' software, such as authorized distribution by the band Wilco and distribution of public domain literary works.⁷⁷ This was sufficient to require reasonable knowledge of specific infringements for liability, and the timing of the knowledge and software design were considered critical.

In *Napster*, Napster was not held liable for infringement merely because it distributed software that could be used to infringe, it was held liable because of *actual* knowledge of infringement *at the time during which it materially contributed to that infringement*.⁷⁸ Instead of the "swap meet" analogy that the *Napster* court relied on, the district court in *Grokster* analogized these defendants to a landlord who had no knowledge of the intended uses for the premises *at the time the lease was signed*.⁷⁹

Grokster distributed the Kazaa Desktop Media system, but did not have access to the source code and could not alter the code in any way.⁸⁰ This FastTrack software also operated in a different manner than Napster. FastTrack employed

71. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031–34 (C.D. Cal. 2003).

72. *See generally P2P: Then, Now and the Future*, SLYCK.COM, Feb. 23, 2004, <http://www.slyck.com/news.php?story=407>.

73. *MGM Studios, Inc.*, 259 F. Supp. 2d at 1033 (citations omitted). The district court made an important observation that distinguished *Grokster* from the *Aimster* case:

Here, it is undisputed that there are substantial noninfringing uses for Defendants' software—e.g., distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare. For instance, StreamCast has adduced evidence that the Morpheus program is regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted.

Id. at 1035.

74. *MGM Studios, Inc.*, 380 F.3d at 1157.

75. *Id.* at 1160.

76. *Id.* at 1160–61.

77. *Id.* at 1161.

78. *A&M Records, Inc.*, 239 F.3d at 1021–22.

79. *MGM Studios, Inc.*, 380 F.3d at 1163–65.

80. *Id.* at 1159–60.

dynamic use of supernodes.⁸¹ A supernode is a node (an end-point on the Internet) that has the heightened function of accumulating information from other nodes. The FastTrack software self-selects its own supernode status and a node can be either a supernode or standard node at any given time. This two-tiered organization has a group of nodes clustered around a supernode and, while Grokster software is preset to a list of supernodes, Grokster did not operate any supernodes, and it had no involvement with the connection to a supernode.⁸² In addition, the software did not require registration, and thus, Grokster had no control over access to the FastTrack network. This also reflects a critical distinction from Napster.⁸³

StreamCast's Morpheus software had access to the source code, however, it is even more "purely" P2P because it does not use supernodes for connections. Instead, it relies on publicly available directories of those connected to the Gnutella network. Search requests are passed entirely from user to user and transfer is initiated directly between the users. While Napster indexed the files and each request passed through a Napster server, this is not the case with either Grokster or StreamCast.

With no active assistance, contribution, support, or control, the court found Grokster and StreamCast were not providing the site and facilities for direct infringement, and thus, were not materially contributing to the direct infringement.⁸⁴ By the time notice of infringement was received, Grokster and StreamCast could do nothing to stop alleged infringement of specific copyrighted content.

The court recognized three elements to vicarious infringement: (1) direct infringement by a primary party; (2) direct financial benefit; and (3) the right and ability to supervise the infringing conduct.⁸⁵ The court also held that *Sony* did not apply to vicarious infringement.⁸⁶ The court had no problem finding direct infringement and a direct financial benefit. However, regardless of plaintiffs' assertion that the defendants had the ability to modify the software or employ meta data and digital fingerprinting filters, the court believed this to be immaterial; the obligation to "police" only arises where there is the right and ability to supervise infringing activity.⁸⁷ The defendants did not operate an integrated service with essential centralized services. Grokster and StreamCast operated with networks entirely out of their control and had no ability to block infringement. Finding no vicarious liability, the court declined the invitation to make law:

The Copyright Owners urge a re-examination of the law in the light of what they believe to be proper public policy, expanding exponentially the reach of the doctrines of contributory and vicarious copyright

81. *Id.* at 1159.

82. *See SLYCK.COM*, *supra* note 72.

83. *MGM Studios, Inc.*, 380 F.3d at 1165.

84. *Id.* at 1163.

85. *Id.* at 1164.

86. *Id.*

87. *Id.* at 1166.

infringement. Not only would such a renovation conflict with binding precedent, it would be unwise. Doubtless, taking that step would satisfy the Copyright Owners' immediate economic aims. However, it would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context.

Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.⁸⁸

When the U.S. Supreme Court accepted *certiorari*, it sent shockwaves through the legal and technology communities—why else would the Court take the case unless *Sony* was to be examined, and perhaps overturned? Because the case could have significant impact upon emerging and existing technologies, as well as current copyright law, the pleadings included more than fifty amicus briefs.⁸⁹

Although the Court delivered a three-opinion unanimous decision,⁹⁰ the result was remarkably limited:

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.⁹¹

Sony remained intact, the Court addressed the intent to enable infringement as a

88. *Id.* at 1166–1167.

89. For an excellent summary of the arguments and various positions of the amici, see JONATHAN BAND, THE ELECTRONIC FRONTIER FOUNDATION, THE GROKSTER SCORECARD, http://www.eff.org/IP/P2P/MGM_v_Grokster/summary.pdf (last visited Aug. 30, 2006).

90. Unanimous, but three very divergent opinions. While the Court unanimously concurred that Grokster could be liable for inducing copyright infringement, there was disagreement over whether the case was substantially different from *Sony*, and whether the *Sony* precedent should be modified. Justice Ginsburg, joined by Chief Justice Rehnquist and Justice Kennedy, filed a concurring opinion claiming the case differed from *Sony* due to insufficient evidence of noninfringing uses. Justice Breyer, joined by Justice Stevens and Justice O'Connor, filed another concurring opinion claiming that there was no showing of a need to modify *Sony* because of the similarity between lawful file swapping and the lawful uses at issue in *Sony*. See generally, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

91. *Id.* at 2770.

business model, and the Court imported the full patent theory of inducement of infringement that completes the theory of a staple article of commerce. The Justices differed, however, as to the application of *Sony* and left room for some uncertainty.

Justice Souter delivered the opinion of the Court. Justice Souter's review of the technology and P2P businesses led him to the conclusion that, while the networks could share any type of digital file, the primary purpose was to share copyrighted works without authorization.⁹² Beginning with the *Sony* factor that Grokster and Streamcast did not know what particular files were being copied, Justice Souter had no problem concluding that it was clear that most of the files were, in fact, copyrighted works. He then turned to the intent behind the models of the file sharing services.

Accepting MGM's assertions that the vast majority of users' downloads were acts of infringement, the Court concluded that the "probable scope of copyright infringement is staggering."⁹³ The Court also observed that the services learned about infringement from users and responded with guidance.⁹⁴ In addition, the Court noted the services' active role:

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.⁹⁵

Promotion, marketing, and the business models confirmed a clear intent on the part of the services to encourage infringement.

The Court kept in mind the competing values of protection of artistic expression and technological innovation as it worked through its interpretation of *Sony*.⁹⁶ It found that the court of appeals had misinterpreted *Sony*, which had barred secondary liability based on a presumption of intent solely from the design or distribution of a product capable of substantial lawful use.⁹⁷ It believed the lower court had converted *Sony* from a case about imputed intent to one of liability on any theory. With that, the Court declined to modify *Sony* and turned to inducement of infringement.

The Court found common law inducement theories still valid and also noted that patent law had codified inducement as a part of the staple-article rule:

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that

92. *Id.* at 2772.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2775.

97. *Id.* at 2778.

one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.⁹⁸

Pretty clever. The *Sony* defense was developed by taking a patent law theory and applying it to copyright. The Supreme Court completed the application by taking the remaining patent theory of inducement. The evidence below demonstrated clear evidence of a purpose to cause copyright violations.

Justice Ginsburg wrote a concurrence that agreed with the inducement theory, but also offered an opinion that the issue of contributory copyright infringement was a possibility on the record.⁹⁹ She disagreed with the court of appeals finding that there need only be a showing that a product was capable of substantial noninfringing use.¹⁰⁰ She found no evidence of fair use and only anecdotal evidence of noninfringing uses—built entirely on a “motley collection” of declarations, which did not support summary judgment.¹⁰¹ She believed that the evidence demonstrated overwhelming infringement and she saw no evidence that commercially significant noninfringing uses would develop over time.¹⁰² It seems that Justice Ginsburg would have revisited *Sony* to consider a standard of overwhelming infringing use.

Justice Breyer made the inducement holding unanimous, but took Justice Ginsburg to task on the *Sony* question. In fact, Justice Breyer was convinced that the court of appeals had come to the right conclusion on the *Sony* factors.¹⁰³ Justice Breyer reminded Justice Ginsburg that the question in *Sony* was whether the product was merely *capable* of substantial noninfringing uses.¹⁰⁴ In *Sony*, the district court had found that only 9% of VCR recordings were noninfringing.¹⁰⁵

98. *Id.* at 2780 (citation omitted).

99. *Id.* at 2783 (Ginsburg, J., concurring).

100. *Id.* at 2784–86.

101. *Id.* at 2786 n.3.

102. *Id.* at 2786.

103. *Id.* at 2787 (Breyer, J., concurring).

104. *Id.* at 2788.

105. *Id.*

The Supreme Court found this 9% to be significant and also noted that there was significant potential for future authorized copying. This potential creation of a yet unknown market, in conjunction with 9% authorized use, was enough to avoid liability.

Taking the assertions below that the P2P services had 10% authorized use, Justice Breyer found this to be very similar to *Sony*, and determined that this amount was, indeed, significant.¹⁰⁶ In addition, the standard was one of *capability* and he found it very likely that lawful uses would become increasingly prevalent, such as research, historical and educational materials, public domain materials, podcasts, and software distribution:

There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony*'s standard. And while *Sony* considered the record following a trial, there are no facts asserted by MGM in its summary judgment filings that lead me to believe the outcome after a trial here could be any different. The lower courts reached the same conclusion.

Of course, Grokster itself may not want to develop these other noninfringing uses. But *Sony*'s standard seeks to protect not the Groksters of this world (which in any event may well be liable under today's holding), but the development of technology more generally. And Grokster's desires in this respect are beside the point.¹⁰⁷

DIGITAL MILLENNIUM COPYRIGHT ACT SUBPOENA LITIGATION

After the court of appeals loss in *Grokster*, the copyright owners sued the direct infringers, using DMCA subpoenas to get names of infringers. The DMCA provides expedited subpoena procedures for copyright owners to discern the identities of individuals it believes are infringing copyrights.¹⁰⁸ No suit needs to be filed and the subpoena issues from the clerk of court, rather than the judge.¹⁰⁹ Because of the ease and effectiveness—and given the loss in *Grokster*—the content community asserted very liberal interpretations of the statute.

In *RIAA, Inc. v. Verizon Internet Services, Inc.*,¹¹⁰ the RIAA moved to enforce a DMCA subpoena served on Verizon, which had refused to comply.¹¹¹ The RIAA sought the identity of an anonymous user of Verizon's Internet service, who was alleged to have infringed copyrights in over 800 songs by making them available

106. *Id.* at 2789.

107. *Id.* at 2790.

108. 17 U.S.C.A. § 512(h) (2006).

109. 17 U.S.C.A. § 512(h)(1).

110. 351 F.3d 1229 (D.C. Cir. 2003).

111. *Id.* at 1231.

for download.¹¹² Verizon argued, *inter alia*, that the DMCA subpoena was only applicable to materials stored on the ISP's servers, not materials that were stored on a user's computer and then transmitted over the ISP's service as a mere conduit.¹¹³

Verizon advanced a fairly "technical" argument based on a strict reading of Section 512(c)¹¹⁴ and Section 512(h).¹¹⁵ The subpoena provisions in Section 512(h) refer back to the notice provisions of Section 512(c), and Section 512(c)'s provisions anticipate that the materials would be *stored* on the ISPs' servers. With pure P2P, files are never stored; the ISP is just a conduit. However, the district court believed that even if the statute was not technically applicable, Congress had spoken through the "text, structure and purpose" of the DMCA sufficiently to find the subpoena applicable to P2P.¹¹⁶

The Court of Appeals for the D.C. Circuit reversed, finding that the DMCA language was clear that use of the subpoena was directly linked to the storage requirement. Although unsympathetic to the RIAA's arguments, the court was sensitive to their circumstances:

We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress; only the

112. *Id.* at 1233.

113. *Id.*

114. 17 U.S.C. § 512(c) limits the liability of ISPs for infringing material on Websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met: (1) the provider must not have the requisite level of knowledge of the infringing activity; (2) if the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity; (3) upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material; and (4) a service provider must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement. *See* 17 U.S.C.A. § 512(c) (2006).

115. 17 U.S.C. § 512(h), Subpoena To Identify Infringer, provides:

- (1) Request. A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.
- (2) Contents of request. The request may be made by filing with the clerk:
 - (A) a copy of a notification described in subsection (c)(3)(A);
 - (B) a proposed subpoena; and
 - (C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

See 17 U.S.C.A. § 512(h) (2006).

116. *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24, 39 (D.D.C. 2003).

“Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”¹¹⁷

While a victory for ISPs, this decision is another clear warning for higher education institutions acting as an ISP, because it is another unsympathetic court inviting Congress to take action in the P2P war. As is discussed below, it is a roadmap for Congress to revise the protections in the DMCA—eliminating the broad protections for an ISP acting as a conduit.

When Boston College was served with DMCA subpoenas for the names of students, it moved to quash.¹¹⁸ Boston College was concerned that the subpoenas were issued in the District of Columbia, requested “expedited” production, and did not provide sufficient time to notify students under the provisions of Family Educational Rights and Privacy Act (“FERPA”).¹¹⁹ The U.S. District Court in Massachusetts ordered the subpoenas quashed, but the order only referred to Fed. R. Civ. P. 45(a)(2) and (b)(2), which do not allow a subpoena issued in Washington, D.C. to be served in Massachusetts.¹²⁰

The University of North Carolina at Chapel Hill and North Carolina State University were served with RIAA subpoenas requesting names of individuals identified only by screen names.¹²¹ These subpoenas followed an initial attempt by the RIAA to serve the subpoenas from the U.S. District Court in the District of Columbia. John and Jane Doe moved to intervene and quash. Given the court of appeals decision in *Verizon*, the universities also moved to quash. Amici Curiae and the Federal Government also joined in the arguments.¹²²

The court followed the D.C. Circuit’s holding that DMCA Section 512(h) subpoenas do not apply to P2P because the files are never stored on the ISPs’ servers. The court believed that the RIAA’s interpretation would be a “quantum leap” in changing the statute as written. In addition, the court questioned the constitutionality of the DMCA subpoena statute and at least inferred that due process was a significant issue. The court quashed both subpoenas.¹²³

117. *RIAA, Inc.*, 351 F.3d at 1238 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)).

118. Motion of Boston Coll. To Quash Subpoenas and for a Protective Order, *In Re Subpoenas to Boston Coll.*, Civ. Act. No. 03-MBD-10210 (D. Mass. Jul. 21, 2003), available at <http://www.eff.org/IP/P2P/boston1.pdf>.

119. See Memorandum of Boston Coll. in Support of Its Motion To Quash Subpoenas and for a Protective Order, *In re Subpoenas to Boston Coll.*, Civ. Act. No. 03-MBD-10210 (D. Mass. Jul. 21, 2003), available at <http://www.eff.org/IP/P2P/boston2.pdf>. See generally 20 U.S.C.A. § 1232g (2006); 34 C.F.R. pt. 99.1 *et al.* (2006); U.S. Dept. of Educ., Family Educational Rights and Privacy Act, <http://www.ed.gov/policy/gen/guid/fpc/ferpa/index.html> (last visited Aug. 30, 2006).

120. *Boston Coll. v. RIAA, Inc.*, Civ. Act. No. 1:03-MC-10210-JLT (D. Mass. Aug. 7, 2003), available at <http://www.eff.org/IP/P2P/RIAA-v-bc-order-to-quash.pdf>.

121. *In re Subpoena to Univ. of N.C. at Chapel Hill*, No. 1:03MC138 (M.D.N.C. Apr. 14, 2005); *In re Subpoena to N.C. State Univ.*, No. 1:03MC139 (M.D.N.C. Apr. 14, 2005).

122. *Id.*

123. *Id.*

So now, the P2P file sharing war is being fought hand-to-hand with thousands of John and Jane Doe lawsuits. All while some new studies and research are suggesting that CD sales have not been affected by file sharing,¹²⁴ and new business models are emerging which allow downloads for a fee. But, both private and public institutions remain at risk from the content community, as sympathetic courts and Congress consider revisiting the broad protections for contributory and vicarious infringement.

DIRECT ACTIONS AGAINST INSTITUTIONS OF HIGHER EDUCATION

As the law stands now, there are broad prohibitions against contributory and vicarious liability actions aimed at institutions of higher education. The DMCA provides a prohibition from filing suit against an ISP acting as a conduit for infringing materials and the Eleventh Amendment provides further protections for public institutions. However, Congress has the ability and, it would seem, the growing desire, to change or eliminate these protections. If higher education does not meet these challenges by effectively addressing the P2P issues, the liability landscape may dramatically change.

DMCA Section 512(a) Safe Harbors

Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act, now codified in 17 U.S.C. Section 512, creates safe harbors for an ISP, if the ISP follows specified procedures and adopts specified policies.¹²⁵ In order to qualify for the limitations on liability in Section 512, an institution must qualify as a “service provider.”¹²⁶ For the limitation relating to transitory communications, which is how P2P files are transferred, a service provider is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹²⁷ In addition, to be eligible for the limitations, a service provider must meet two conditions: it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and it must accommodate and not interfere with “standard technical measures.”¹²⁸

Nearly all higher education institutions have adopted a DMCA notice and takedown policy, registered an agent,¹²⁹ and responded to notices of copyright

124. See Oberholzer & Strumpf, *supra* note 3.

125. U.S. COPYRIGHT OFFICE, *supra* note 29, at 8–13.

126. 17 U.S.C.A. § 512(k)(1)(A) (2006).

127. *Id.*

128. *Id.* § 512(i).

129. To comply with the DMCA, a completed form entitled “Interim Designation of Agent to Receive Notification of Claimed Infringement” is required. This is a necessary procedure for Title II compliance, and is filed with the Copyright Office. See U.S. Copyright Office, Online Service Providers, <http://www.copyright.gov/onlinesp/> (last visited Aug. 30, 2006). See also U.S. COPYRIGHT OFFICE, *supra* note 29, at 11.

infringement. However, the provisions were drafted before P2P was an issue and it is impossible to take down infringing files that merely pass through the system. Still, it is essential that a policy is in place.

Section 512(a) limits the liability of service providers if the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at another's request. This limitation covers transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network:

(a) Transitory digital network communications—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.¹³⁰

With no requirement to monitor transmissions, or even respond to transmissions of data the ISP knows is infringing, this blanket protection is the ultimate shield for higher education. But, nothing stands in the way of Congress modifying Section 512(a) or eliminating it altogether. Nothing prevents a court from making an interpretation that its provisions are not as broad as it seems. And nothing in higher education's mission and values justifies it turning a blind eye to infringement. While certain academics and organizations disagree with the basic

130. 17 U.S.C.A. § 512(a) (2006).

principles of the content community,¹³¹ most academics do not, and neither the Federal Courts nor Congress seem to have any sympathy with the intellectual property communists and anarchists. Just the opposite—they are increasingly alarmed by the effect of P2P, as demonstrated by the hearings held by the House Subcommittee on Courts, the Internet and Intellectual Property.

One of the first P2P salvos was directed against Napster *and* Yale University, Indiana University, and the University of Southern California.¹³² The band Metallica brought suit alleging piracy and challenged Section 512(a) protections. The allegations were no more subtle than the band's chord progressions, charging that "hypocritical universities and colleges . . . could easily block this insidious and ongoing thievery."¹³³ The suits were dropped after the institutions blocked Napster, so the issues were never resolved. But, given the implementation of copyright education and policies long before the Internet existed, and computer use policies that prohibited illegal activities on the Internet long before P2P existed, most representatives of higher education institutions would strongly disagree with Metallica's characterization.¹³⁴ Unfortunately, the content community shared the view that higher education was the primary problem, as demonstrated by letters to presidents and chancellors demanding that they monitor content and stop all P2P traffic.¹³⁵

In a growing climate of distrust and with proposed legislation that ranged from enhanced criminal penalties to permitting the remote destruction of P2P users' hard drives, higher education responded in a variety of ways.¹³⁶ It is a short, and far more palatable step, to simply remove the protections of Section 512(a), rather than attempt to push for legislation that permits remote destruction of hard drives. This would place private institutions immediately at risk, since they arguably provide the "site and facilities" for users' infringement. For public institutions there is still the issue of sovereign immunity, but sovereign immunity for intellectual property infringement has been a persistent subject for congressional action.¹³⁷

Sovereign immunity for intellectual property actions against state entities has

131. See, e.g., Scott Carlson, *In the Copyright Wars, This Scholar Sides With the Anarchists*, CHRON. HIGHER EDUC., Nov. 19, 2004, at A29.

132. See Carlson, *supra* note 4.

133. Univ. of Texas System, Office of the General Counsel, University Liability for Student Infringements: "Napster" and Internet Service Provider Liability Limitations, <http://www.utsystem.edu/OGC/INTELLECTUALPROPERTY/napster.htm> (last visited Aug. 30, 2006).

134. See *id.*

135. See Press Release, Recording Indus. Ass'n of Am., Music, Movie Industries Target Theft On Internal Campus Networks (Apr. 27, 2006), available at <http://www.riaa.com/news/newsletter/042706.asp>.

136. See Declan McCullagh, *Senate Bill Would Ban P2P Networks*, CNET NEWS.COM, June 23, 2004, http://news.com.com/2100-1027_3-5244796.html.

137. See generally Bruce E. O'Connor & Emily C. Peyser, *Ex Parte Young: A Mechanism for Enforcing Federal Intellectual Property Rights Against States*, 10 B.U. J. SCI. & TECH. L. 225 (2004); Jason Karasik, Note, *Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act*, 27 HASTINGS COMM. & ENT. L.J. 475 (2005).

been the subject of attack in recent years. The higher education community has been forced to respond to congressional attempts to remove immunity as recently as 2003, when the Intellectual Property Protection Restoration Act of 2003 was introduced.¹³⁸ The sovereign immunity argument is well beyond the scope of this article,¹³⁹ but much of the lack of support for the legislation came from a strong argument that this Act was a response to an imagined problem. The instances of state entities abusing immunity were very few. P2P, on the other hand, is ubiquitous and real. If higher education does not demonstrate that its response to P2P is genuine and effective, another attack on sovereign immunity may be justified.

MODEL APPROACHES TO ADDRESSING THE P2P PROBLEM

While some institutions have completely “outlawed” P2P services and actively monitor content,¹⁴⁰ the approach at most institutions has been to treat the Internet and attending services as another forum and resource—regardless of whether the issue is allocation of resources, security, or infringement. We do not allow students to take 500 books out of the library at one time. That is about the same effect as downloading audio files—it is an unnecessary and selfish misuse of resources. This is a concern regardless of whether the downloading is legal or not. Similarly, the security concerns we have across campus are part of our computer responsibilities. Where infringement is concerned, we do not condone copyright violations in any forum, and take a very strong stance against infringement. But, we do not have monitors watching every act members of the academic community make either, and we must resist subpoenas which are not lawfully issued.

The diligence higher education has for copyright integrity is not always apparent, and the need to balance the competing interests in copyright is seen by the content community as a willful disregard for their rights. Our “corporate” model is one in which we promote and give tenure to academics who advocate a complete overhaul of the intellectual property system, we give students access to the most sophisticated technology, and we support librarians who advocate the most free distribution of information as possible. Yet, we also demand legal and ethical behavior from the entire higher education community—usually as a matter of honesty and trust. Because of these competing interests and somewhat diverse goals, higher education has invited the content community to join us in our efforts to teach respect for copyright.

In 2002, a joint committee of members of the higher education and content community was formed to tackle the problems of P2P on campuses head-on.¹⁴¹

138. H.R. 2344, 108th Cong. (2003).

139. See generally *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

140. See, e.g., Katie Dean, *Florida Dorms Lock Out P2P Users*, WIRED NEWS, Oct. 3, 2003, <http://www.wired.com/news/digiwood/0,1412,60613,00.html>.

141. See EDUCASE Major Initiatives, Joint Committee of the Higher Education and

The committee identified three basic approaches to reducing or eliminating unauthorized P2P file sharing: (1) campus education policies and practices concerning copyright rights and responsibilities and their implications for P2P file sharing; (2) the use of computer network management technologies to control inappropriate file sharing; and (3) the development of legal, campus-based online music subscription services.¹⁴² To accomplish their goals, a request for information (RFI) was solicited for technologies that could help curb illegal peer-to-peer network file sharing on college and university campuses.¹⁴³ In addition, a second RFI was issued to inquire about available legitimate online music and movie services, the goal being implementation of pilot projects to implement campus-based legitimate online music and movie services.¹⁴⁴

A white paper, "Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks," designed to help school administrators better understand the application of copyright law to peer-to-peer network file sharing and students' legal liability when they engage in this illegal activity, was freely distributed.¹⁴⁵ This was closely followed by "University Policies and Practices Addressing Improper Peer-to-Peer File Sharing."¹⁴⁶ These papers give additional guidance on the P2P issues and also give examples of how campuses are addressing specific concerns. By doing so, they not only give guidance for campuses considering additional implementation, they also demonstrate the serious attention higher education is paying to the issue. While the campus examples are diverse, the common theme of policies, education, technological measures, and access to alternatives remains the same.

A particularly creative effort is a DVD and streaming video released by the

Entertainment Communities Technology Task Force, <http://www.educause.edu/issues/rfi/> (last visited Aug. 30, 2006).

142. See Press Release, EDUCASE Major Initiatives, Joint Higher Education and Entertainment Group Issues Review of Year-Long Efforts to Curb Illegal File Sharing on College Campuses (Sept. 2, 2003), available at <http://www.educause.edu/PressRelease/1206?ID=1084>.

143. See JOINT COMMITTEE OF THE HIGHER EDUCATION AND ENTERTAINMENT COMMUNITIES TECHNOLOGY TASK FORCE, TECHNOLOGY OPPORTUNITIES FOR ADDRESSING ISSUES ASSOCIATED WITH PEER-TO-PEER FILE SHARING ON THE UNIVERSITY AND COLLEGE CAMPUS (Apr. 23, 2003), http://www.educause.edu/elements/attachments/rfi/rfi_1/universitiesfi.doc.

144. See JOINT COMMITTEE OF THE HIGHER EDUCATION AND ENTERTAINMENT COMMUNITIES TECHNOLOGY TASK FORCE, OPPORTUNITIES FOR ONLINE DISTRIBUTION OF MUSIC, MOVIES, AND OTHER DIGITAL CONTENT ON THE UNIVERSITY AND COLLEGE CAMPUS, http://www.educause.edu/elements/attachments/rfi/rfi_2/AuthorizedOnlineServicesRFI.doc (last visited Aug. 30, 2006).

145. AMERICAN COUNCIL ON EDUCATION, DIVISION OF GOVERNMENT RELATIONS AND PUBLIC AFFAIRS, BACKGROUND DISCUSSION OF COPYRIGHT LAW AND POTENTIAL LIABILITY FOR STUDENTS ENGAGED IN P2P FILE SHARING ON UNIVERSITY NETWORKS (Aug. 8, 2003), <http://www.acenet.edu/AM/template.cfm?template=/CM/contentDisplay.cfm&ContentID=11008>.

146. AMERICAN COUNCIL ON EDUCATION, DIVISION OF GOVERNMENT RELATIONS AND PUBLIC AFFAIRS, EDUCATION UNIVERSITY POLICIES AND PRACTICES ADDRESSING IMPROPER PEER-TO-PEER FILE SHARING (Apr. 2004), <http://www.educause.edu/ir/library/pdf/CSD3092.pdf>.

Intellectual Property Institute at the University of Richmond School of Law.¹⁴⁷ Entitled “What Do You Think,” the video is designed not to be “a lecture on right and wrong but a call to action—think, engage, and decide these issues for yourself.”¹⁴⁸ The work is released under a Creative Commons license,¹⁴⁹ and distribution and use on campuses is encouraged. This work captures the best of the educational approach. It encourages respect for copyright, yet attempts to change behavior through critical thinking and dialogue—a teaching moment.

On another front, an unprecedented collaboration by the Association of American Universities, the Association of Research Libraries, the Association of American University Presses, and the Association of American Publishers has produced “Campus Copyright Rights and Responsibilities: A Basic Guide to Policy Considerations.”¹⁵⁰ This work is a guide for understanding the issues and risks related to copyright in all areas of academia. The work describes its purpose as:

The principal objective of this project was to bring together these groups, which have differing perspectives and often conflicting views on the appropriate use of copyrighted works, to produce a document that conveys their common understanding regarding the basic meaning and practical significance of copyright for the higher education community.¹⁵¹

It is easy to deem something fair use if you do not know what fair use really is. Just as it is easy to be critical of a system if you do not understand the basics of that system.

Every campus should employ a multi-prong approach to file sharing, including policy, education, technological measures, and access to alternatives. All institutions must maintain and enforce computer use and copyright policies which prohibit copyright infringement and misuse of IT resources. Most of these policies were adopted in the 1990’s and may require updates and modification to better address not only the technical challenges to P2P, but also the challenges of infringement. The computer use policy provides the standard by which Internet traffic and information can be managed.

A complete and detailed copyright policy should also be in place—both for education and to work in conjunction with computer use and student codes for disciplinary actions. In addition, many campuses have developed specific P2P warnings and policies.¹⁵² These policies are further enforced through student

147. Documentary: What do you Think? Documentary National CyberEducation Project (Univ. of Richmond School of Law Intellectual Property Institute 2005) (*available at* <http://www.law.richmond.edu/ipi/whatdoyouthink.htm>).

148. *Id.*

149. See Creative Commons, <http://creativecommons.org/> (last visited Aug. 30, 2006).

150. ASSOCIATION OF AMERICAN UNIVERSITIES, CAMPUS COPYRIGHT RIGHTS AND RESPONSIBILITIES: A BASIC GUIDE TO POLICY CONSIDERATIONS (Dec. 2005), http://aaupnet.org/aboutup/issues/Campus_Copyright.pdf.

151. *Id.* at i.

152. See, e.g., Cornell University Office of Information Technologies, Peer-to-Peer File

disciplinary actions, which at the University of North Carolina campuses have ranged from disconnecting the infringer from the Internet and expunging programs on their computers to suspensions.

Campuses must also continually educate their communities about copyright and P2P use. The resources discussed above provide almost everything any campus needs to establish an effective education program. But, the key to education on copyright is to continually address the issues at orientations for students and faculty, at workshops for new department chairs and deans, and as a condition of Internet use. The face-to-face education is tedious and difficult, but it must accompany the written and audiovisual materials in order to make an impact.

Technological measures range from blocking P2P to restricting bandwidth for dormitories or placing restrictions on time of day or user; most institutions employ at least some type of bandwidth restriction of P2P usage. The University of Connecticut has addressed the costs of P2P by imposing a default block on all P2P services except those used for Intranet applications.¹⁵³ But, a student can request access for a limited time to gain P2P bandwidth. This approach balances the cost and relative inappropriate use with access for legitimate purposes.

The University of North Carolina and others have also worked with a grant from the content community to establish pilot programs on campuses with providers of licensed digital entertainment.¹⁵⁴ These providers included Ruckus, Cdigix, Rhapsody, and Napster. The primary purpose was intended to habituate students to enhanced lawful services. The effects of the pilots across the country are still being evaluated. Some campuses have decided to use institutional funds to make alternative legitimate services available.¹⁵⁵ In addition, legitimate services such as iTunes, have been successful as the content community retools its business model.

CONCLUSION

As we wait for the courts to apply *Grokster*,¹⁵⁶ for Congress to contemplate new

Sharing: Policy and Resources Issues, <http://www.cit.cornell.edu/oit/policy/memos/filesharing.html> (last visited Aug. 30, 2006); Kalamazoo College, Peer-to-Peer File Sharing Policy: Information Series (May 3, 2006), <http://www.kzoo.edu/is/sysnet/policies/peertopeer.shtml>; Mary Anne Fox, James L. Oblinger, & George Worsley, Open Letter from the Chancellor: Liability for Illegal File Sharing (Feb. 13, 2004), <http://www.ncsu.edu/copyright/liability.html>; Stephen A. Jarrell & Robert J. Shelton, Copyright Warning to the UNC Campus Community (Nov. 2003), <http://www.unc.edu/policy/copyrightwarning.html>.

153. Andrew Porter, *University P2P Policy to Change*, THE DAILY CAMPUS, Apr. 11, 2006, <http://www.dailycampus.com/media/storage/paper340/news/2006/04/11/News/University.P2p.Policy.To.Change1843895.shtml?norewrite200606061546&sourcedomain=www.dailycampus.com>.

154. See Univ. of N.C., UNC Launching First Peer File Sharing Initiative (Oct. 14, 2004), <http://www.northcarolina.edu/content.php/pres/news/releases/pr2004/20041014.htm>.

155. See Katie Dean, *Penn State Napster Ink Pact*, WIRED NEWS, Nov. 6, 2003, <http://www.wired.com/news/digiwood/0,1412,61093,00.html>. But see John Borland, *Penn State Student Blast Napster Deal*, CNET NEWS.COM, Nov. 6, 2003, http://news.com.com/2100-1027_3-5103918.html.

156. See, e.g., *Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877 (N.D. Ill. 2005); *BMG Music v. Gonzales*, 430 F.3d 888 (7th Cir. 2005).

legislation for P2P, and for the content community to create a business model more attractive than expensive CD's or infringing P2P networks, it is important to remember that while technology is progressing at a revolutionary pace, the core issues are timeless and do not always need a high-tech approach. In fact, the issues are the same ones the academy has always faced—questions of ownership, intrusion into private lives, and ethical actions in the face of choices. These are what our concerns should be, regardless of whether the forum is the Internet, library, classroom, hallway, or dormitory. Regardless of the forum, higher education has a stake in the issues and a duty to promote ethical actions.

P2P's application to contributory and vicarious copyright infringement has sent courts in odd searches for analogies and methods of analysis—from the “purveyor of slinky dresses to potential prostitutes,”¹⁵⁷ to “owners of swap meet premises,”¹⁵⁸ to the “landlord/tenant relationship.”¹⁵⁹ None fits particularly well, which is why the inducement of infringement theory advanced in *Grokster* is the most logical place for the courts to land. The provisions of the DMCA were written before P2P was in existence and the blanket protections in Section 512(a) can be eliminated if Congress is convinced that ISPs are not worthy of the protection. Moreover, the widespread abuses in current P2P services may provide the justification that some members of Congress have been looking for to force the states to waive sovereign immunity for intellectual property actions. These uncertainties have made it more difficult for higher education to maintain its balance, enforce discipline for unauthorized file sharing while maintaining academic freedom and fair use, promote technology that promises to enhance education, and still keep its safe harbors intact.

The copyright and computer use policies we have in effect can be models for the balance between copyright ownership and the equally important principles of fair use and academic freedom; and the educational, technical, and disciplinary measures and solutions we have in place can enhance that balance. Through technical restrictions and by providing access to alternatives, we can reduce the effect of P2P abuses on legitimate resources. And by attempting always to teach first and discipline second, we can encourage and reinforce habitual respect for ownership and fair use. To take a different stance on Internet use would be chasing the technology, rather than facing the basic ethical and legal problems at hand. In the meantime, we will take lessons from Belgium on how to survive a war we did not invite.

157. In re *Aimster*, 334 F.3d at 651.

158. *A&M Records, Inc.*, 239 F.3d at 1023.

159. *MGM Studios, Inc.*, 380 F.3d at 1164.

THE TIMES THEY ARE A-CHANGIN'¹: HOW CURRENT PROVISIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, RECENT DEVELOPMENTS IN INDIRECT COPYRIGHT LAW AND THE GROWING POPULARITY OF STUDENT PEER-TO-PEER FILE-SHARING COULD “CHILL” ACADEMIC FREEDOM AND TECHNOLOGICAL INNOVATION IN ACADEMIA

BRIAN MCCORMICK*

I. INTRODUCTION

The contours of the law of academic freedom have been molded over time by the guiding hands of political strife, racial inequality, and religious division.² In much the same way, the research and development efforts conducted at U.S. colleges and universities have shaped the technological progress of the last three decades.³ However, as academia adapts to the modern technological landscape, the principles of academic freedom and the resulting technological advancement they foster may soon be influenced more by commercial interests than by societal unrest.

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1. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

2. *See generally* *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Widmar v. Vincent*, 454 U.S. 263 (1981).

3. *See generally* Lila Guterman, *Research Inc.*, CHRON. HIGHER EDUC., Nov. 25, 2005, at A13–A14.

Despite recent attempts by the entertainment industry to curb online copyright infringement, the number of people illegally “trading” copyrighted music, movies, and television programs over the Internet has never been greater.⁴ According to industry officials, these so-called “pirates” utilize the Internet, along with peer-to-peer (P2P) networking software, to plunder potential profits from “[c]omposers, artists, musicians, technicians, and a multitude of others engaged in the music, film, and other entertainment industries.”⁵ Unfortunately, recent statistics indicate that college and university students represent a significant segment of the file-sharing community.⁶ As the entertainment industry continues its legal crusade against P2P network software makers and those that use these services to infringe copyrighted works, many college and university officials have become increasingly concerned that their institutions will be targeted by this campaign.⁷ Adding to the urgency, recent developments in indirect copyright law will undoubtedly operate as new weapons in the entertainment industry’s campaign against illegal P2P file-sharing.⁸ Consequently, many college and university officials are taking steps to prevent protracted litigation and limit potential liability.⁹ These steps, in concert with current provisions of the Digital Millennium Copyright Act, may ultimately have a “chilling effect” on academic freedom and technological innovation at campuses nationwide.¹⁰

4. See Jefferson Graham, *Court Cases Don't Scare Music File Swappers Away*, USA TODAY, Sept. 7, 2005, at 5B.

5. *Protecting Copyright and Innovation in a Post-Grokster World: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Cary Sherman, President, Recording Industry Association of America), 2005 WLNR 15361093.

6. See *Peer-to-Peer Piracy on University Campuses: Hearing Before the Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 2 (2003), available at http://www.nacua.org/nacualert/docs/Peer_to_Peer/SmithStatement.htm [hereinafter *2003 Subcomm. Hearing*] (statement of Lamar Smith, Chairman, Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary).

7. See Memorandum from Timothy C. O'Rourke, Vice President for Computer and Information Services at Temple Univ. to Temple Univ. Students (Nov. 25, 2003), <http://www.temple.edu/cs/VPannouncements/filesharingpolicy.html> (last visited Apr. 3, 2006); Memorandum from Marye Anne Fox, Chancellor at N.C. State Univ. to N.C. State Univ. Students, Faculty, and Staff (Feb. 13, 2004), <http://www.ncsu.edu/copyright/liability.html> (last visited Apr. 3, 2006).

8. See Cathleen Flahardy, *Grokster Creates New Liabilities For Tech Industry*, CORP. LEGAL TIMES, Aug. 2005, at 54.

9. See generally EDUC. TASK FORCE OF THE JOINT COMM. OF THE HIGHER EDUC. AND ENTM'T COMMUNITIES, UNIV. POLICIES AND PRACTICES ADDRESSING IMPROPER PEER-TO-PEER FILE SHARING 2-6 (2004) [hereinafter *Univ. Policies and Practices*] (discussing various methods used by college and university officials to combat P2P file-sharing at campuses across the U.S.).

10. See THE ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: FIVE YEARS UNDER THE DMCA 1, http://www.eff.org/IP/DMCA/unintended_consequences.pdf (last visited Apr. 4, 2006) [hereinafter *Unintended Consequences*] (providing examples of how the “anti-circumvention” provisions of the DMCA have already “chilled” academic research and discussion); Andrea L. Foster, *Colleges Split Over Effects of Court Ruling on File Sharing*, CHRON. HIGHER EDUC., July 8, 2005, at A1 (stating that “a decision in favor of the entertainment industry [in the *Grokster* case] could stifle technological innovation and prevent scholars from legally trading data, video, music, and literature using peer-to-peer networks.”).

II. OUR ALLEGED "CULTURE OF UNLICENSED USE"¹¹

No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. *Today's pirates operate not on the high seas but on the Internet . . .*¹²

This Recording Industry Association of America's (RIAA) portrayal cleverly demonstrates the current view pervasive in both the recording and motion picture industries.¹³ In support of this view, both the RIAA and the Motion Picture Association of America (MPAA) offer numerous figures and statistics¹⁴ as evidence of our current "culture of unlicensed use."¹⁵ According to the RIAA, the recording industry as a whole loses approximately \$4.2 billion worldwide each year due to illegal music copyright violations.¹⁶ Moreover, they assert that illegal Internet file-sharing is to blame for the 21% drop in compact disc shipments from 1999 to 2004.¹⁷ In a statement made before the U.S. House Subcommittee on Courts, the Internet, and Intellectual Property, Richard Taylor (Senior Vice President of the MPAA) estimated that more than 400,000 movies are illegally downloaded everyday.¹⁸

Although these figures may be somewhat exaggerated, the assertion at the heart of the entertainment industry's rhetoric appears valid. Despite recent attempts to curb illegal Internet file-sharing, the number of people using P2P networks has never been greater.¹⁹ According to Eric Garland, CEO of the online media measurement company BigChampagne, approximately 9.6 million people were

11. Recording Industry Association of America Online Piracy and Electronic Theft Webpage, <http://www.riaa.com/issues/piracy/online.asp> (last visited Nov. 17, 2005) [hereinafter *RIAA Online Piracy and Electronic Theft*].

12. *Id.*

13. *See id.*; *see also* Motion Picture Association of America Internet Piracy Webpage, http://www.mpaa.org/piracy_internet.asp (last visited Apr. 3, 2006) (stating that "[d]ownloading a movie off of the Internet is the same as taking a DVD off a store shelf without paying for it").

14. *See* Recording Industry Association of America Anti-Piracy Webpage, <http://www.riaa.com/issues/piracy/default.asp> (last visited Apr. 1, 2006) [hereinafter *RIAA Anti-Piracy*] (estimating that illegal music piracy costs the record industry millions of dollars a day and accounts for total losses of \$4.2 billion annually worldwide); Motion Picture Association of America 2004 Piracy Fact Sheet: US Overview (Nov. 2004) (on file with author), *available at* <http://www.mpaa.org/USPiracyFactSheet.pdf> (last visited Apr. 1, 2006) (stating that the film industry lost \$3.5 billion in 2004 because of illegal movie piracy).

15. *RIAA Online Piracy and Electronic Theft*, *supra* note 11.

16. *RIAA Anti-Piracy*, *supra* note 14.

17. *See* Benny Evangelista, *Music File-Sharing Case Before High Court; Ruling Could Have Major Effect on Future of Entertainment Industry, Consumer Rights*, S. F. CHRON., Mar. 28, 2005, at A1.

18. *See Peer-to-Peer Piracy: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2005), 2005 WLNR 14949366.

19. *See* Graham, *supra* note 4.

logged onto these types of networks at any second in August 2005, demonstrating a 41% increase from the previous year.²⁰ Furthermore, according to some estimates, more than 60% of the total U.S. Internet traffic can be attributed to P2P network usage.²¹ When considering the fact that unlawful copyrighted files like movies, music, and television programs constitute approximately 90% of the information available through these networks, the justification for the entertainment industry's "war" on illegal P2P file-sharing is more easily understood.²²

Unfortunately, current evidence demonstrates that college and university students comprise a major portion of the P2P piracy "pie."²³ A statement made by Representative Lamar Smith, the chairman to the House Subcommittee on Courts, the Internet, and Intellectual Property, illustrates the prevalence of this problem on college and university campuses. At a 2003 oversight hearing, Smith stated:

Research of FastTrack, a P2P file-sharing service, showed that 16% of all the files available at any given moment are located at IP addresses managed by U.S. educational institutions. In addition, FastTrack users trading from networks managed by U.S. educational institutions account for 10% of all users on FastTrack at any given moment.²⁴

III. THE RESPONSE TO STUDENT FILE-SHARING

A. The Entertainment Industry

Media companies like the RIAA and MPAA are leading the charge against illegal P2P file-sharing on college and university campuses.²⁵ According to RIAA spokesperson Jenni Engebretsen, the RIAA has filed 1,062 copyright infringement lawsuits against students at 132 colleges and universities since September 2003.²⁶ Most of these claims stem from student file-sharing over P2P services like Kazaa, Grokster, Limewire, and i2hub.²⁷ As of October 2005, about 14,800 people had

20. *Id.*

21. See *Reducing Peer-to-Peer (P2P) Piracy on University Campuses: A Progress Report: Hearing Before the Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 65 (2005) (statement of Adam Schiff, Member, House Comm. on the Courts, the Internet and Intellectual Property).

22. *Id.*

23. See *2003 Subcomm. Hearing*, *supra* note 6, at 3.

24. *Id.*

25. See Recording Industry Association of America, *Music Industry Continues Campaign Against Campus Internet Theft* (Oct. 26, 2005) (on file with author), available at <http://www.riaa.com/news/newsletter/102605.asp> (last visited Apr. 3, 2006); Claire Hoffman, *Anti-Piracy Message Stumbles at Colleges*, L.A. TIMES, Nov. 18, 2005, at C1 (discussing a recent MPAA college anti-piracy "tour" to increase awareness of illegal copyright infringement).

26. See Chad Smith, *Despite Risk of Lawsuits, N.Y.U. Students Live on the Download*, THE VILLAGER, Mar. 10, 2006, ¶ 16, available at http://www.thevillager.com/villager_149/despiteriskoflawsuitsnyu.html.

27. See generally *id.*

been sued by the RIAA for online copyright infringement.²⁸ Not to be outdone, in August 2005, the MPAA filed copyright infringement suits against 286 individuals accused of P2P piracy.²⁹ In addition, both organizations have partnered to promote a free software program called Digital File Check that helps to remove or block file-sharing software as well as identify and delete copyrighted music and movies from a user's computer.³⁰

B. The Federal Government

The entertainment industry's crusade to control P2P piracy is also gaining support throughout the federal government.³¹ In 2002, congressional leaders teamed with representatives from higher education and the entertainment industry to create the Joint Committee of Higher Education and Entertainment Communities.³² This joint committee was formed for the expressed purpose of "examin[ing] ways to reduce the inappropriate use on campuses of P2P file sharing technologies."³³ Further, the U.S. House Subcommittee on Courts, the Internet, and Intellectual Property has held numerous oversight hearings exploring "the extent of P2P piracy on university campuses and what measures content owners and universities are taking to address the problem."³⁴ Also, as expected, legislation has been introduced to further strengthen existing U.S. copyright laws.³⁵ For instance, if enacted as proposed, the Inducing Infringement of Copyright Act of 2004 would extend civil liability to those who "intentionally induce" others to commit copyright infringement.³⁶

Finally, the Federal Bureau of Investigation (FBI), in partnership with the RIAA and MPAA, has recently announced a new anti-piracy initiative that includes

28. *Id.*

29. See Motion Picture Association of America, *No Honor Among Thieves: Motion Picture Industry Takes Action Against Peer to Peer Movie Thieves Handed Over By Several Torrent Sites* (Aug. 25, 2005) (on file with author), available at http://www.mpaa.org/press_releases/2005_08_25.pdf (last visited Apr. 3, 2006).

30. See Motion Picture Association of America, *Film and Music Industries Team Up to Help Consumers Find Potentially Infringing Material on their Computers* (Sept. 30, 2005) (on file with author), available at http://www.mpaa.org/press_releases/2005_09_30b.pdf (last visited Apr. 3, 2006).

31. See Statement by Higher Education Members of Joint Comm., Purpose and Scope of the Joint Comm. of the Higher Educ. and Entm't Communities (Dec. 10, 2002) (on file with author), available at <http://www.aau.edu/intellect/JointP2PCMR.pdf> (last visited Nov. 21, 2005) [hereinafter *Higher Education Members*]; Federal Bureau of Investigation, FBI, In Partnership with Entertainment and Software Industries, Announces Anti-Piracy Warning Initiative (Feb. 19, 2004) (on file with author), available at <http://www.fbi.gov/pressrel/pressrel04/piracy021904.htm> (last visited Nov. 21, 2005).

32. *Higher Education Members*, *supra* note 31.

33. *Id.*

34. 2003 Subcomm. Hearing, *supra* note 6, at 3.

35. See, e.g., S. 2560, 108th Cong. § 2 (2004).

36. *Id.* Currently, this act, which was originally introduced during the 108th session of Congress, has been referred to the Senate Committee on the Judiciary for debate. See Library of Congress THOMAS Legislative Database, S. 2560 Bill Summary and Status, <http://thomas.loc.gov/bss/108search.html> (search "Bill Number" for "S. 2560").

increased enforcement efforts and the introduction of a new FBI anti-piracy warning label.³⁷ This label, which will be affixed to a lot of the material that falls within the scope of U.S. copyright law, warns potential violators of the penalties associated with illegal copyright infringement.³⁸

C. Colleges and Universities

Finally, due to entertainment industry pressure, concern for students, and the desire to protect limited computing resources, many colleges and universities are now addressing the P2P file-sharing threat in a number of ways.³⁹ Many now sponsor extensive education campaigns, informing students and faculty of the consequences that could result from illegal P2P file-sharing.⁴⁰ Also, a growing number of institutions are now offering, or are planning to offer, free music download services to students as a legitimate, legal alternative to illegal P2P file-sharing.⁴¹

At the far end of the prevention "spectrum," many college and university officials have now implemented more invasive measures including strict enforcement penalties and extensive preemptive network monitoring.⁴² These penalties vary at each institution, but most impose varying levels of computing suspensions on students depending on the frequency of infringement.⁴³ For example, at the University of Pittsburg, a second offense of P2P file-sharing results in judicial proceedings.⁴⁴ At Harvard University, a similar offense results in a one-year ban from all campus computing resources.⁴⁵ Additionally, the University of Florida has recently developed software it calls "ICARUS," (Integrated Computer Application for Recognizing User Services) which monitors all campus Internet traffic and detects P2P use over campus networks.⁴⁶ When any P2P activity is

37. See Federal Bureau of Investigations Cyber Investigations Webpage, <http://www.fbi.gov/ipr/> (last visited Apr. 3, 2006).

38. *Id.*

39. See generally *Univ. Policies and Practices*, *supra* note 9, at 1–9.

40. See JAMES E. PORTER & MARTINE COURANT RIFE, *MGM V. GROKSTER: IMPLICATIONS FOR EDUCATORS AND WRITING TEACHERS* 3–4 (2005), http://www.wide.msu.edu/widepapers/grokster/wide_grokster.pdf (last visited Dec. 6, 2005). Many institutions, such as Emory University, have chosen to communicate the negative consequences associated with illegal P2P file-sharing through paid advertisements in campus newspapers, emails sent to every campus network user, and/or posters and pamphlets displayed throughout campus. *Id.* at 3. Also, many institutions, like the University of Virginia, require all students to complete online training sessions on the pitfalls of P2P copyright infringement and pass a quiz before utilizing any campus computing resource. *Id.* Finally, many institutions, like the University of Pennsylvania and Princeton University, offer periodic presentations to students and faculty outlining the effect P2P file-sharing can have on campus computing resources and the personal consequences of direct copyright infringement. *Id.*

41. *Univ. Policies and Practices*, *supra* note 9, at 5.

42. *Id.* at 4–6.

43. *Id.* at 5.

44. *Id.*

45. *Id.*

46. *Id.* at 4.

found, ICARUS “automatically disconnects the student for increasing periods of time depending on the number of offenses, with a third offense resulting in student judicial procedures.”⁴⁷

IV. STATUTORY & COMMON LAW UNDERPINNINGS

A. The Federal Copyright and Copyright Infringement

The federal Copyright Act (Copyright Act) protects the exclusive rights of those who own valid copyrights to various original artistic works.⁴⁸ Generally, copyright infringement occurs when a person “interferes” with one of these exclusive rights.⁴⁹ Because copyright infringement is considered a strict liability tort, culpability for an offense does not depend on the existence of actual intent to harm.⁵⁰

Anyone who personally commits an infringing act is liable under the principles of “direct” copyright infringement.⁵¹ Also, under the “indirect” theory of contributory infringement, liability may be imposed on those who do not directly perform infringing acts.⁵² Contributory infringement occurs when, “with knowledge of the infringing activity, [one] induces, causes or materially contributes to the infringing conduct of another”⁵³

Under the current statutory scheme, anyone who infringes a valid copyright may be subject to civil liability,⁵⁴ including “actual damages” equal to the loss resulting from the infringement and any subsequent profits gained by the violator, or “statutory damages.” Statutory damages can range from \$750 to \$150,000 for each infringed copyrighted work.⁵⁵ Also, anyone who “willfully” violates the rights of a copyright owner for commercial purposes or for private financial gain may be punished criminally by up to five years in prison and \$250,000 in fines.⁵⁶

47. *Id.* at 5.

48. *See* G. PETER ALBERT, JR., *INTELLECTUAL PROPERTY LAW IN CYBERSPACE* 213 (1999).

49. *See* BLACK’S LAW DICTIONARY 348 (2nd pocket ed. 2001).

50. *See* Elliot M. Zimmerman, *P2P File Sharing: Direct and Indirect Copyright Infringement*, 78 FLA. BAR. J. 40, 41 (2004).

51. *See* ALBERT, JR., *supra* note 48, at 246.

52. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).

53. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

54. *See* EDUC. TASK FORCE OF THE JOINT COMM. OF THE HIGHER EDUC. AND ENTMT COMMUNITIES, 108th Cong., *BACKGROUND DISCUSSION OF COPYRIGHT LAW AND POTENTIAL LIABILITY FOR STUDENTS ENGAGED IN P2P FILE SHARING ON UNIV. NETWORKS* 6, 8 (2003) [hereinafter *Background Discussion of Copyright Law*].

55. *See* 17 U.S.C. § 504 (2000); *Background Discussion of Copyright Law*, *supra* note 54, at 8. In cases of “willful” infringement, the court has the discretion to increase the statutory damage award to a maximum of \$150,000 for each infringed copyrighted work. *Id.* “Willful” infringement is established when the defendant knew, had reason to know, or recklessly disregarded the fact that his or her conduct constituted infringing activity. *Id.* at 7.

56. *See* 17 U.S.C. § 506 (2000); *see also* Recording Industry Association of America

B. The Digital Millennium Copyright Act's "Anti-Circumvention" and "Safe Harbor" Provisions

In 1998, the Digital Millennium Copyright Act (DMCA) was enacted in an attempt to harmonize U.S. copyright laws with those of other World Intellectual Property Organization (WIPO) Treaty countries,⁵⁷ thereby ushering U.S. copyright law into the information age.⁵⁸ Included among the major additions were certain "anti-circumvention" provisions, which now appear in Section 1201 of the Copyright Act.⁵⁹ These provisions, which impose both civil and criminal liability,⁶⁰

ban[] the bypassing of technical measures used by copyright owners to protect access to their works[,], outlaw[] the manufacture or distribution of technologies primarily designed or produced to circumvent technical measures used by copyright owners to protect their works[, and] make[] removal or alteration of copyright management information (CMI) from digital copies of copyrighted works illegal.⁶¹

In ratifying these provisions, Congress intended to further promote worldwide access to copyrighted works by reassuring copyright holders that their works would not succumb to the "unique threat" posed by digital technologies.⁶² Despite these intentions, the DMCA "anti-circumvention" provisions have been widely criticized as a threat to civil liberties, the free exchange of information and, as discussed below, academic freedom.⁶³

Additionally, the DMCA amended the Copyright Act to include certain "safe harbor" provisions that limit the liability of Internet "service providers."⁶⁴ These statutory safe harbors can be employed, under certain circumstances, to protect qualifying parties from monetary damages that may result from the copyright

Copyright Law Webpage, <http://www.riaa.com/issues/copyright/laws.asp#uscopyright> (last visited Apr. 3, 2006).

57. See Lance C. McCardle, *Despite Congress's Good Intentions, the DMCA's Anti-Circumvention Provisions Produce a Bad Result—A Means to Create Monopolies*, 50 LOY. L. REV. 997, 1003 (2004).

58. U.S. COPYRIGHT OFFICE, EXECUTIVE SUMMARY DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT, http://www.copyright.gov/reports/studies/dmca/dmca_executive.html (last visited Apr. 3, 2006).

59. *Unintended Consequences*, *supra* note 10, at 1.

60. *Id.* at 2.

61. Pamela Samuelson, *Anticircumvention Rules: Threat to Science*, SCI., Sept. 14, 2001, at 2028.

62. Mia K. Garlick, *Locking Up the Bridge on the Digital Divide—A Consideration of the Global Impact of the U.S. Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 941, 952 (2004).

63. Myron Hecht, *Reconciling Software Technology and Anti-Circumvention Provisions of the Digital Millennium Copyright Act*, 2004 J.L. & TECH. 3, 3 (2004). For further discussion on issues of academic freedom as they relate to the "anti-circumvention" provisions of the DMCA, please see Section VII below.

64. See *Background Discussion of Copyright Law*, *supra* note 54, at 7.

violations of its users.⁶⁵ Because of the Act's broad definition of "service provider," most institutions of higher education qualify for protection under these safe harbor provisions.⁶⁶ However, these provisions only apply when the service provider adheres to the specific conditions established in 17 U.S.C. § 512(i).⁶⁷ Most importantly, a service provider must have "adopted and reasonably implemented . . . a policy [which has been communicated to all network users] that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."⁶⁸

V. THE EVOLUTION OF PEER-TO-PEER CONTRIBUTORY COPYRIGHT JURISPRUDENCE

A. Sony, Napster & Aimster

From its inception, the "Betamax defense" crafted by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* served as a broad limitation on claims of indirect copyright liability.⁶⁹ In holding that Sony was not liable under the theory of contributory infringement, the Court stated that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes [, or] [i]n indeed, [is] . . . merely . . . capable of substantial noninfringing uses."⁷⁰

After *Sony*, the well-publicized *A & M Records, Inc. v. Napster, Inc.* case marked the first opportunity for a federal appellate court to address whether a company could be held liable as a contributory infringer for producing, marketing, and distributing P2P file-sharing software to users who utilize the software to directly infringe copyrights.⁷¹ Ultimately, the Ninth Circuit Court of Appeals found Napster liable as a contributory infringer, expressly denying Napster's claim that it was immune from liability under the *Sony* Betamax defense.⁷² Although

65. *Id.*

66. *Id.* at 6.

67. *Id.* at 7.

68. 17 U.S.C. § 512(i)(1)(A) (2000).

69. John A. Fedock, Comment, *The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model*, 32 PEPP. L. REV. 947, 960 (2005).

70. *Sony Corp. of Am.*, 464 U.S. at 442.

71. See Robert A. Gilmore, *Peer-to-Peer: Copyright Jurisprudence in the New File-Sharing World, the Post Grokster Landscape of Indirect Copyright Infringement and the Digital Millennium Copyright Act*, 5 FLA. COASTAL L.J. 85, 98 (2004).

72. See *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001). In finding Napster liable as a contributory infringer, the court concluded that Napster "had actual [knowledge] of direct infringement because the RIAA informed it [that] more than 12,000 infringing files" existed on Napster's P2P network. *Id.* at 1022 n.6. Also, the court found that Napster had materially contributed to its users' direct infringement by providing the "site and facilities" utilized by Napster users to locate and download copyrighted music. *Id.* at 1022.

Napster argued that its network was capable of “substantial noninfringing uses,” the court refused to strictly apply the *Sony* precedent.⁷³ Instead, the court applied an alternative line of cases, concluding that the Betamax defense did not apply given Napster’s actual knowledge of its users’ direct infringement and its ability to identify and remove copyrighted material from its network.⁷⁴

Shortly after the *Napster* case was decided, the Seventh Circuit Court of Appeals was confronted with the similar case of *In re Aimster Copyright Litigation*.⁷⁵ Here, as in *Napster*, the court specifically rejected Aimster’s assertion of immunity under the *Sony* Betamax defense.⁷⁶ Although the court acknowledged that the Aimster network was capable of many noninfringing uses, it reasoned that the proportion of infringing uses to noninfringing uses was controlling.⁷⁷ In other words, it is not sufficient that substantial noninfringing uses were possible; rather, Aimster was required to proffer evidence that its network was “*actually* used for . . . the stated non[]infringing purposes” to avoid contributory liability.⁷⁸

B. Grokster I & II

In 2004, the Ninth Circuit was again presented with a P2P file-sharing liability case in *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd. (Grokster I)*.⁷⁹ In refusing to hold Grokster liable as a contributory infringer,⁸⁰ the court specifically contradicted the probable noninfringing use standard articulated by the Seventh Circuit in *Aimster*.⁸¹ Restating its holding in *Napster*, the court held that, because the Grokster network was capable of substantial noninfringing uses, contributory liability would only attach if Grokster had actual knowledge of specific infringing files on the network and failed to act on that knowledge.⁸² According to the court, Grokster lacked this knowledge and the subsequent ability to prevent the acts of direct infringement because it maintained no “master list” of the materials available for distribution over its network.⁸³

Faced with the task of clarifying the applicability of the doctrine of contributory infringement and the application of the *Sony* Betamax defense in a P2P context, the U.S. Supreme Court granted certiorari to the subsequent *Grokster* appeal (*Grokster*

73. *Id.* at 1020.

74. *Id.* at 1021–22.

75. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

76. *Id.* at 653.

77. *Id.*

78. *Id.*

79. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005).

80. *Id.* at 1160, 1163.

81. *Id.* at 1162 n.9.

82. *Id.* at 1162.

83. *Id.* at 1163. The court stated that, if Grokster “closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.” *Id.* (citation and quotation omitted).

II),⁸⁴ In this opinion, the Court declined to clarify the Betamax defense,⁸⁵ unanimously applying the “active inducement” theory of liability commonly employed in patent litigation.⁸⁶ According to the opinion authored by Justice Souter, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁸⁷ Pointing to “clear” evidence of such intent, the Court vacated the Ninth Circuit holding, remanding the case for further proceedings.⁸⁸ Specifically, the Court drew attention to Grokster’s attempts to attract former Napster users to its service.⁸⁹ Moreover, Grokster’s need to secure substantial infringing user volume in order to generate advertising revenue and its failure “to develop filtering tools or other mechanisms to diminish the infringing activity using their software” highlighted its “intentional facilitation of their users’ infringement.”⁹⁰ Finally, in what is likely the most puzzling portion of the opinion, the Court stated the following in footnote twelve:

Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.⁹¹

Despite this reference, the Court specifically left “further consideration of the *Sony* [Betamax] rule for a day when that may be required.”⁹²

Unfortunately, the *Grokster II* Court did more to muddle the contributory infringement “water” than to purify it. In expressly sidestepping any detailed application of *Sony*, the Court failed to clarify whether, under *Sony*, a network’s substantial noninfringing uses must be probable (as in *Aimster*) or just capable (as in *Napster* and *Grokster I*) to avoid indirect liability.⁹³ Additionally, the Court further confused the already nebulous “active inducement” standard by, in the opinion of one legal theorist, setting “a fairly low and confusing bar for finding the ‘active’ part of the inducement.”⁹⁴ Specifically, under this opinion, companies are

84. See Christine Pope, *Unfinished Business: Are Today’s P2P Networks Liable for Copyright Infringement?*, 2005 DUKE L. & TECH. REV. 24, ¶ 25 (2005).

85. *Id.* at ¶ 29.

86. *Id.* at ¶ 25.

87. *Metro-Goldwyn-Mayer Studios, Inc.*, 125 S. Ct. at 2770.

88. See *id.* at 2782–83.

89. *Id.* at 2781.

90. *Id.*

91. *Id.* at 2781 n.12.

92. *Id.* at 2779.

93. Pope, *supra* note 84, at 2784.

94. Ernest Miller, *Kicking the Sony Can Down the Road*, THE IMPORTANCE OF...: LAW AND I.T., June 28, 2005, http://importance.corante.com/archives/2005/06/28/kicking_the_sony_can_down_the_road.php. Ernest Miller is a graduate of Yale Law School and currently serves as a fellow of the Information Society Project at Yale Law School. *Id.*

not required to include infringement-reducing design features in their products and are free to adopt business models that require advertising revenue.⁹⁵ However, as soon as a company “pass[es] some unknown threshold of intent,” these otherwise lawful and rational business decisions may be considered.⁹⁶ As a result, the Court established a precedent under which future courts searching for evidence of intent of inducement may scrutinize every business, marketing, and design choice with twenty-twenty hindsight.⁹⁷

C. Monotype

To date, the only case to specifically apply the “active inducement” standard enumerated by the *Grokster II* Court in a contributory infringement action is *Monotype Imaging, Inc. v. Bitstream Inc.*⁹⁸ In this case, Monotype Imaging, Inc. (Monotype) brought a contributory infringement action against Bitstream Inc. (Bitstream), a competing computer font software development company, to prevent the further distribution of Bitstream’s TrueDoc font typeface replication software.⁹⁹ In applying *Grokster II*, the district court found “no evidence in the record that supports that Bitstream acted with the requisite intent to make it liable under *Grokster [II’s]* intentional inducement of infringement cause of action.”¹⁰⁰ Pointing to the three indicators of intent mentioned above, the court found that Bitstream’s software did not specifically target known infringing users, that the software’s success was not dependant on high infringing user volume, and that Bitstream had taken precautions to prevent the use of its software with copyrighted fonts.¹⁰¹

VI. THE PERCEIVED INSTITUTIONAL LIABILITY

In light of these recent developments, the current scope of contributory copyright liability is unclear. However, given this ambiguity, we can expect that the recording and film industries will read the statutory and common law as broadly as possible to target other P2P file-sharing intermediaries, including colleges and universities.¹⁰² Consequently, many colleges and universities are left guessing as to the extent to which they must police P2P file-sharing over campus

95. See Ernest Miller, *Kicking the Sony Can Down the Road*, THE IMPORTANCE OF...: LAW AND I.T., June 27, 2005, http://importance.corante.com/archives/2005/06/28/kicking_the_sony_can_down_the_road.php.

96. *Id.*

97. See Derek Slater, *What is “Inducement”?*, SCOTUSBLOG, June 27, 2005, http://www.scotusblog.com/discussion/archives/2005/06/what_is_inducem.html. Derek Slater is a student fellow at the Berkman Center for Internet and Society. *Id.*

98. *Monotype Imaging, Inc. v. Bitstream Inc.*, 376 F. Supp. 2d 877, 882–83 (N.D. Ill. 2005).

99. *Id.*

100. *Id.* at 889.

101. *Id.*

102. PORTER & RIFE, *supra* note 40, at 2.

networks in order to avoid claims based on these principles.¹⁰³

As mentioned previously, most colleges and universities that offer campus-wide Internet access may qualify for protection under the “safe harbor” provision of the DMCA as “service providers.”¹⁰⁴ But, in order to qualify, these institutions must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”¹⁰⁵ Unfortunately, the DMCA is silent as to what constitutes “appropriate circumstances” or who may be defined as a “repeat infringer.” So, depending on judicial interpretation, a college or university could be held liable as a contributory infringer even though its administration took action against student copyright violators.

Additionally, many critics suggest that the *Grokster II* decision could be used by the entertainment industry as a basis to require “academic institutions to assume the role of cop, judge and jailer” in the fight against student copyright infringement.¹⁰⁶ Although such action is unlikely in light of the probable, limited *Monotype*-like application of the “active inducement” theory, uncertainty still remains. Specifically, given the highly factual nature of the inquiry under *Grokster II*’s “active inducement” theory, the Court’s ill-defined “threshold of intent” which is required to establish inducement could require institutions to engage in expensive, protracted discovery before being absolved from liability.

Finally, the ambiguity inherent in the proposed Inducing Infringement of Copyright Act, which criminalizes actions by anyone that “intentionally induces” the direct infringement of copyrighted materials, only adds to the confusion.¹⁰⁷ Under this Act, “intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.”¹⁰⁸ The “reasonable person” standard relied on here is difficult to define, and is ultimately open to varying judicial interpretations. As a result, the Act would provide the entertainment industry with an additional tool, strengthened by the accompanying threat of stiff criminal penalties, which could be employed in contributory liability litigation against colleges and universities.

VII. THE RESULTING “CHILL” ON ACADEMIC FREEDOM AND TECHNOLOGICAL INNOVATION

Above all, the mission of institutions of higher education is to facilitate and

103. *Id.*

104. *See supra* notes 64–68 and accompanying text.

105. 17 U.S.C. § 512(i)(1)(A) (2000).

106. THE ELECTRONIC FRONTIER FOUNDATION, UNIVERSITIES SHOULD RESIST NETWORK MONITORING DEMANDS, <http://www EFF.ORG/IP/P2P/university-monitoring.pdf> (last visited Apr. 4, 2006) [hereinafter *Universities Should Resist*].

107. *See supra* notes 35–36 and accompanying text.

108. S. 2560, 108th Cong. § 2 (2004).

encourage the free and open exchange of ideas.¹⁰⁹ According to the U.S. Supreme Court, “[t]he college classroom with its surrounding environs is peculiarly ‘the marketplace of ideas.’”¹¹⁰

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.¹¹¹

Increasingly, students and faculty at U.S. colleges and universities are using web logs (also known as “blogs”) and digital bulletin boards to facilitate academic discourse.¹¹² As the Ninth Circuit recognized in a lower *Grokster* decision, P2P file-sharing technology is “regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted.”¹¹³

Despite this, the DMCA “anti-circumvention” provisions, which outlaw the distribution of tools and technologies that facilitate the circumvention of anti-piracy protections, along with liability-limiting measures like extensive network surveillance and mandatory computing, have created an environment of distrust in which the free exchange of ideas is possible.¹¹⁴ As currently imposed, this “strait jacket” poses a very real threat to academic freedom and the technological innovation that results from it.¹¹⁵ For example, companies like Hewlett Packard and Sony have used the threat of litigation under the “anti-circumvention” provisions to impede the spread of computer security-related “vulnerability” research.¹¹⁶ As a result of measures like this, “online service providers and bulletin board operators have begun to censor discussions of copy-protection systems . . . and students, scientists and security experts have stopped publishing details of their research on existing security protocols.”¹¹⁷

Furthermore, this “strait jacket” could have an additional and more tangible chilling effect on the development of innovative, multipurpose technologies nationwide. Today, private industry relies more heavily on the research and development efforts of colleges and universities than ever before.¹¹⁸ Increasingly, the early-stage innovations that are made in these research laboratories are patented and licensed to private companies, who unlimitedly develop new products

109. *Universities Should Resist*, *supra* note 106.

110. *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted).

111. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

112. *Unintended Consequences*, *supra* note 10, at 2, 7.

113. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated* 125 S. Ct. 2764 (2005).

114. *Unintended Consequences*, *supra* note 10, at 1.

115. *Id.*

116. *Id.* at 1–2.

117. *Id.* at 2.

118. *See generally* Guterman, *supra* note 3.

and bring them to market.¹¹⁹ More so now than ever, collaboration facilitated by P2P file-sharing between researchers around the world makes these innovations possible.¹²⁰ These networks operate as an efficient way for researchers to disseminate innovative ideas throughout academia, work side-by-side with colleagues on the other side of the world, and pool the collective intellect of the world's foremost experts in a field.¹²¹

Most notably, these provisions discourage computer "vulnerability" research that works to expose potential threats to computer system security.¹²² To illustrate, consider the story of Princeton professor Edward Felten and his team of computer security researchers.¹²³ In September 2000, Felten and his researchers successfully defeated digital watermark technology that was thought to protect copyrighted music files in response to a public challenge issued by the Secure Digital Music Initiative (SDMI).¹²⁴ When Felten and his team attempted to present this research at an academic conference, SDMI brought the full weight of the "anti-circumvention" provisions to bear, threatening both Felten and conference organizers with civil liability under the DMCA.¹²⁵ With much hesitation, Felten and his team eventually conceded to SDMI's threats, pulling the research from the conference.¹²⁶ Unfortunately, threats like these are not unique.¹²⁷ When coupled with the liability limiting computing practice employed by many college and university administrators, it is easy to understand why many of America's innovators may choose to change the course of their research and development efforts or abandon them altogether. Subsequently, next generation technologies, like the Digital Video Recorders (DVR), Digital Video Disc (DVD) players, and iPods, may never make it to market.¹²⁸

119. *See generally id.*

120. *See generally* Heather Green, *Commentary: Are the Copyright Wars Chilling Innovation?*, BUSINESS WEEK ONLINE, Oct. 11, 2004, http://www.businessweek.com/magazine/content/04_41/b3903473.htm (last visited Dec. 7, 2005).

121. *See id.*

122. *See generally Unintended Consequences*, *supra* note 10, at 2.

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. For example, in April 2003, educational software company Blackboard Inc. used the threat of civil liability under these provisions to prevent Georgia Institute of Technology students from presenting research on computer security weaknesses in a Blackboard Inc. product at a computer security conference in Atlanta. *Id.* at 3.

128. *See generally* Brief of Intel Corporation as *Amicus Curiae* Supporting Affirmance at 19, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480).

VIII. POTENTIAL SOLUTIONS & REFORMS

A. Judicial Clarification

Certainly, any proposed solution to remedy the potential “chill” on academic freedom and technological innovation at U.S. colleges and universities should begin with judicial action. Fortunately, much of the ambiguity that has arisen from the Supreme Court’s *Grokster II* opinion could easily be remedied with a simple stroke of the U.S. Supreme Court’s pen. As stated earlier, many college and university administrators are left guessing as to what level of preemptive and post-infringement action must be taken in order to avoid indirect contributory liability.¹²⁹ Furthermore, despite the Supreme Court’s limited application of the *Grokster II* “active inducement” standard in *Monotype*, many questions are left unanswered. As a result, the Supreme Court should re-examine both the application of the *Sony* Betamax defense and its newly established “active inducement” standard in subsequent opinions. Specifically, the Court should clarify what continued relevance, if any, the *Sony* Betamax defense maintains in a post-*Grokster II* world. More importantly, the Court should clearly demarcate the boundaries of its “active inducement” doctrine, better explaining the point at which a party’s actions are transformed from valid business decisions to specific evidence of an intent to induce the copyright infringement of others. In doing so, the Court could eliminate much of the confusion caused by the interaction between the “active inducement” standard and footnote twelve of the *Grokster II* opinion.¹³⁰

B. Legislative Revisions and Reform

In addition to judicial action, legislative revisions and reforms are needed to help mitigate the threat to academic freedom and technological innovation. To date, numerous critics, legislators, and public interest groups have proposed a range of potential solutions.¹³¹ Among them, the Digital Media Consumers’ Rights Act of 2005 (DMCRA)¹³² has been put forward to remedy the “overzealous copy protection[s]” enumerated under the DMCA.¹³³ According to advocates, this act, which was sponsored by Virginia Democratic Representative Rick Boucher, would restore the historic balance “between the rights of the users of intellectual

129. PORTER & RIFE, *supra* note 40, at 2.

130. *See supra* Part V.B.

131. *See, e.g.*, Robin D. Gross, *Circumvention Prohibitions Reconsidered: Why America’s Mistake is Europe’s Future*, IP JUSTICE EUCD UPDATE, <http://www.ipjustice.org/eucd012903.shtml> (last visited May 1, 2006); Congressman Rick Boucher Official Homepage, <http://www.boucher.house.gov/> (follow “Legislative Information” hyperlink; then follow “Internet and Technology Initiatives” hyperlink) (last visited May 1, 2006) [hereinafter *Boucher Homepage*]; EDUCAUSE, THE DMCA REVISITED: WHAT’S FAIR?, <http://www.educause.edu/ir/library/pdf/EPO0410.pdf> (last visited May 1, 2006).

132. Digital Media Consumers’ Rights Act of 2005, H.R. 1201, 109th Cong. (1st Sess. 2005).

133. Andrea L. Foster, *Library Groups Join Effort to Ease Copyright Law’s Restrictions on Digital Sharing*, CHRON. HIGHER EDUC., July 9, 2004, at A31.

property and the rights of those who create it.”¹³⁴ In doing so, this act would amend the “anti-circumvention” provisions of the DMCA to permit the bypassing of copyright protection measures as long as such conduct does not ultimately result in unlawful copyright infringement.¹³⁵ Through this amendment, vital scientific research like that of Edward Felten and his team would no longer be hindered by threats and intimidation, and research could be more widely shared throughout the academic community.

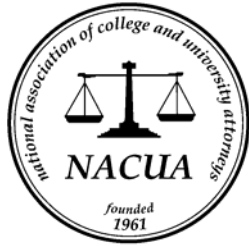
Moreover, in conjunction with the passage of the DMCA, Congress should amend the DMCA to include “penalty” provisions allowing for a defendant’s automatic recovery of reasonable attorney’s fees from any unsuccessful civil plaintiff. As discussed above, ill-defined doctrines, standards, and tests permeate current contributory copyright law. As a result, colleges and universities may be required to undertake expensive and time-consuming discovery to defend even the most frivolous contributory infringement actions. However, if this burden was shifted off the shoulders of colleges and universities, and instead placed on those instituting unsuccessful civil actions, college and university administrators could relax current liability-limiting safeguards that work to discourage academic freedom and technological innovation.

IX. CONCLUSION

It is well settled that college and university students contribute significantly to illegal P2P file-sharing “piracy,” putting them at odds with the entertainment industry, Congress, and general principles of copyright law. Until recently, P2P file-sharing intermediaries, like colleges and universities, were afforded the protection of the well-established, bright-line rules. However, the ambiguity inherent in the recent *Grokster II* and *Monotype* decisions and the proposed Inducing Infringement of Copyright Act of 2004, along with the vague language and sometimes broad provisions of the Digital Millennium Copyright Act, undermine these established principles, creating an expansive new weapon in the entertainment industry’s crusade against P2P piracy. To limit the threat of potential litigation, some college and university officials are implementing harsh measures that could ultimately create an environment of distrust at their respective institutions. Unfortunately, the collective effect of these measures, along with current statutory law, may have the unintended consequence of chilling the academic discourse vital to higher education’s central goal and the technological innovation on which private industry has come to rely. To remedy this, both Congress and the courts should act to reduce ambiguity and clarify nebulous concepts, thereby encouraging the type of free and open exchange that is crucial to academia’s “marketplace of ideas.”

134. *Boucher Homepage*, *supra* note 131 (follow “Legislative Information” hyperlink; then follow “Internet and Technology Initiatives” hyperlink; then follow “Boucher’s Statement Before the Subcommittee on Telecom and the Internet” hyperlink under “H.R. 1201, the Digital Media Consumers’ Rights Act”) (last visited May 1, 2006).

135. *Foster*, *supra* note 133, at A1.



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