
COPYRIGHT IMPLICATIONS FOR ONLINE DISTANCE EDUCATION

AUDREY WOLFSON 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

* Professor of Business Law, Richard Stockton College of New Jersey. An earlier version of this article was presented at the 5th Global Conference on Business & Economics at Cambridge University in July 2006, where it received the McGraw Hill Publishing Best Paper Award in the category of Ethics, Business Law and Issues in Higher Education. The earlier version of this article will appear in an upcoming issue of *The International Journal of Business and Economics* in recognition of its receipt of the McGraw Hill Best Paper Award.

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.