

An Education in ©opyright Law:

A Primer for Cyberspace

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ABSTRACT

Copyright law is once again at the forefront of education in cyberspace. Although the information super highway offers a variety of useful information, much of it is copyrighted material. Some recent copyright legislation such as the U.S. Digital Millennium Copyright Act and TEACH Act concern web-based education. This work provides an overview of U.S. copyright law including the new legislation and related issues.

I. THE LAW OF COPYRIGHT

A. The Basics

1. Overview

Copyright law has been a hot topic of late, especially since the emergence of the Internet as a teaching tool. Once only a research project, the Internet has become the greatest computer system in the world. Also known as the net or cyberspace [1], this information super highway offers a tremendous amount of material. At the same time, the information age has evoked many concerns related to copyright law.

2. Myths and Mistakes Concerning Copyright Law

There are many misconceptions about copyright law. For example, many believe that one needs to provide notice in order to possess a copyrighted work [2]. Some think that registration is necessary or that in all cases photocopying requires express permission from the author. Mistakes also abound as to the defense of copyrights as well as fears of the dreaded “copyright police” coming to arrest one for alleged infringement violations [3]. Copyright law is simply misunderstood.

There is no physicality to copyright protection. A copyright is a type of intellectual property; that is, an attachment of intangible rights occurs when certain rules are followed—reminiscent of federal or state constitutional protections. For example, even though a constitution might burn in a fire, the people governed under that constitution would not lose the fundamental freedoms contained therein. In addition,

several privileges are afforded by copyright law.

3. What is Copyright Law?

Because copyright has been around for most of our country's existence, numerous authors have addressed the subject of copyright law [4]. The fundamental basis of U.S. copyright law stems, in fact, from the United States Constitution: Article 1, Section 8, clause 8. By means of this section, the founding fathers apparently wished to promote science and the useful arts by securing an exclusive right to writings. Unfortunately, the drafters of the Constitution did not explain themselves adequately, making later legislative clarification necessary. Perhaps the most important statute related to copyright is the Copyright Act of 1976 (The Copyright Act) [5] since it forms the basic framework for all of our present statutes.

Section 106 of the Copyright Act provides the owner of a copyright certain exclusive rights. In general, these include five safeguards:

- 1) Reproduction of the copyrighted work
- 2) Preparation of derivative works (adaptations) based upon the copyrighted material
- 3) Distribution of the work
- 4) Performance of the work publicly
- 5) Displaying of the work publicly [6]

Copyright is a legal device. One must carefully examine several factors in order to determine whether or not copyright law is applicable [7]. Also, copyright law, for the most part, is federal in nature, and, at the same time, the laws of other countries must be respected. This work will not address foreign jurisdictional matters such as the international Berne Convention but will focus primarily upon the laws of the United States while making reference to certain treaties and related concepts.

4. Originality

A major requirement in copyright law is that the work be original, independently conceived by its creator, in order to have copyright protection. In Feist, the U.S. Supreme Court explained that the primary objective of copyright law is "not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts . . ." [8]. The case involved the determination of lack of originality in printed, white phone directory pages. The test, however, is not one of newness. For example, if a teacher in Orlando writes an article called "Understanding Copyright Law" and another teacher in Omaha has just completed a very similar article with the same name and neither knows of the other's efforts, both have created an original work; hence copyright protection is afforded to each of them. Courts would of course look very closely at works that seem to mirror others or are verbatim copies since the likelihood of violation is evident.

5. Expressions and Fixation

A key factor in copyright law is expression. All authors, including those online, must

be aware that copyright law affords protection to expressions rather than ideas [9]. Several works that do not enjoy such afforded protection include titles, names, slogans, symbols, designs, lettering, coloring, improvisational speeches, unrecorded performances, concepts, devices, systems, methods, and calendars. Frequently, other legal protections such as trademark, trade name, and patent come into play. Examples of copyrightable material include original, tangible forms of poetry, literature, motion pictures, sound recordings, computer programming, music, videos, plays, photographs, drawings, and the like. The work also needs to be fixed. It is so when its embodiment

is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission. [10]

Just about any form of original expression qualifies as a tangible medium. This includes a computer's random access memory (RAM) as well as notes hurriedly penned upon the back of a table napkin. When dealing with cyberspace, we need to address a multitude of items (such as downloading or copying onto discs and hard drives). Care must be taken to avoid activities that may constitute a violation of fixed, tangible expressions covered by copyright law (see section IIIA infra). These would include copying and/or using someone's work outright, but the problem is that copyright takes many different forms. For example, it has been argued that downloading itself constitutes copying and may very well be an infringement. Also, the faxing of a document qualifies as copying. Many agree that mere transmission is not fixation [11]. Case law is sparse in these areas. Nevertheless, one thing is certain: As a result of our advancing technological capabilities, the Internet will provide many issues for courts to decide. And, just as Congress has grappled over many copyright bills of late [12], legislatures will be kept busy.

6. Formalities

a. Ownership, Registration, and Duration

Ownership rights attach whenever one's expression is fixed in a tangible medium; no other action is necessary to obtain such privileges. Usually the people who create the expression own the copyright thereto, but there are exceptions. For example, if an employee in the course of his or her employment creates such a work, the employer owns the copyright. Or, if the creator sells the copyright, it becomes the property of the business or person who purchases it. Consequently, faculty should be careful in reading contracts as well as faculty handbook language regarding copyright ownership that may be incorporated by reference into contractual agreements. At this time, there is no controlling case law in this area.

It is often surprising to educators that no major protocol exists to obtain copyright protection. Although it is no longer necessary to provide notice (discussed below), registration is advisable. This is the process by which one informs the U.S. Copyright Office of copyright ownership. The Copyright Office provides simple forms [13]. Filling out the paperwork, paying a twenty-dollar fee, and providing a copy of the expression are all that is necessary. Registration assists in protecting one's rights, enjoining others, and obtaining statutory and civil remedies. In fact, registration is required in order to bring an infringement suit [14].

The length of time that copyright protection lasts on one's work used to run for an artist's lifetime plus fifty years. In 1998 President Clinton signed the Sonny Bono Copyright Term Extension Act, a measure extending the term an additional twenty years [15]. If the work is for hire, that is, it is done in the course of employment or has been commissioned, the copyright lasts between 95 and 120 years, depending on the date of publication. Publication includes sales, leasing, freely giving away, and public distribution.

b. Notice

Most are familiar with the old copyright notification symbols, which usually contain a C in a circular symbol, or the actual word copyright, with the date and name of the owner.

Example:

Copyright (or Ó) 1997 Bill Kane

In March 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works [16]. This multinational treaty provided copyright mutual protection and made notice symbols obsolete. By joining Berne, the United States and member nations recognize and respect each other's laws at least minimally. There are advocates of the notice can't hurt rule, but it remains an optional tool at best.

B. The Fair Use Doctrine

There are several defenses available for those who have allegedly violated copyright. Among these defenses are

- the work is in the public domain. For example, federal documents are not afforded the protections of copyright law;
- the copyright may be expired, or the holder may have forfeited his or her rights in the work; or
- the copyright holder may have granted another permission to use the work.

Fair use [17] is also an exception to normal copyright legalities. It allows, in a limited manner, use of copyrighted protected materials for purposes of parody, news reports, comedic acts, research, and education. The law considers four factors in determining if fair use is applicable as a defense. They are

1. the purpose and character of the use, including whether use is of a commercial nature or is for nonprofit educational purposes,
2. the nature of the copyrighted work,
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and

4. the effect of the use upon the potential market for or value of the copyrighted work (^{emphasis added}) [18].

Fair use is on a case-by-case basis. The case of Campbell v. Acuff-Rose Music, Inc. [19] demonstrates this. The Court corrected two common errors of the lower courts. One was to treat the market effect factor as the most important factor; and the other error was to give copyrighted works class treatment by holding, for example, that since the copying of material from one book is infringement, copying from all books is infringement. The Court stressed that simple piracy is to be distinguished from reasonable contentions of fair use. The Supreme Court reversed the Sixth Circuit Court, claiming that it erred in finding copyright infringement against the music group 2 Live Crew. The petitioners were band members Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs. The group parodied Roy Orbison's "Oh, Pretty Woman" in a song Campbell entitled "Pretty Woman" (see Table 1). After nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records.

Appendix A	Appendix B
<p>"Oh, Pretty Woman" by Roy Orbison and William Dees</p>	<p>"Pretty Woman" as Recorded by 2 Live Crew</p>
<p>Pretty Woman, walking down the street,</p>	<p>Pretty woman walkin' down the street</p>
<p>Pretty Woman, the kind I like to meet,</p>	<p>Pretty woman girl you look so sweet</p>
<p>Pretty Woman, I don't believe you,</p>	<p>Pretty woman you bring me down to that knee</p>
<p>you're not the truth,</p>	<p>Pretty woman you make me wanna beg please</p>
<p>No one could look as good as you</p>	<p>Oh, pretty woman</p>
<p>Mercy</p>	<p>Big hairy woman you need to shave that stuff</p>
<p>Pretty Woman, won't you pardon me,</p>	<p>Big hairy woman you know I bet it's tough</p>
<p>Pretty Woman, I couldn't help but see,</p>	<p>Big hairy woman all that hair it ain't legit</p>
<p>Pretty Woman, that you look lovely as can be</p>	<p>`Cause you look like `Cousin It'</p>
<p>Are you lonely just like me?</p>	<p>Big hairy woman</p>
<p>Pretty Woman, stop a while,</p>	<p>Bald headed woman girl your hair won't grow</p>

Pretty Woman, talk a while,	Bald headed woman you got a teeny weeny
Pretty Woman give your smile to me	afro
Pretty woman, yeah, yeah, yeah	Bald headed woman you know your hair could look nice
Pretty Woman, look my way,	Bald headed woman first you got to roll it with rice
Pretty Woman, say you'll stay with me	Bald headed woman here, let me get this hunk of biz for ya
`Cause I need you, I'll treat you right	Ya know what I'm saying you look better than rice a roni
Come to me baby, Be mine tonight	Oh bald headed woman
Pretty Woman, don't walk on by,	Big hairy woman come on in
Pretty Woman, don't make me cry,	And don't forget your bald headed friend
Pretty Woman, don't walk away,	Hey pretty woman let the boys
Hey, O. K.	Jump in
If that's the way it must be, O. K.	Two timin' woman girl you know you ain't right Two timin' woman you's out with my boy last night
I guess I'll go on home, it's late	Two timin' woman that takes a load off my mind
There'll be tomorrow night, but wait!	Two timin' woman now I know the baby ain't mine
What do I see	Oh, two timin' woman
Is she walking back to me?	Oh pretty woman
Yeah, she's walking back to me!	
Oh, Pretty Woman.	

Table 1. A Comparison of the Two Songs Cited in the Case's Appendices.

In this case, the Supreme Court determined that the 2 Live Crew song falls into the fair use category because

- 1) the purpose and character of the use was a parody,
- 2) the nature of the copyrighted song does not prevent commercial use of a parody,
- 3) the portion used was only the necessary amount, as no more of the lyrics were taken than was necessary in relation to the parodic purpose, and
- 4) the parody was unlikely to have a large effect on the marketplace [20].

The major problem with fair use is that few courts have addressed academic concerns. Compare Basic Books, Inc. v. Kinko's Graphics Corp. [21] with American Geophysical Union v. Texaco, Inc. [22]. These latter two cases are from the same federal district court with differing conclusions regarding photocopying for educational and personal use.

1. Confusing the Issue with CONFU

In October 1996, the Working Group on Intellectual Property Rights in the Electronic Environment for the Clinton Administration proposed guidelines under the Conference on Fair Use (CONFU). CONFU was initiated in September 1994 and ended in May 1997. The U.S. Patent & Trademark Office hosted the event at which over twenty topics of interest were discussed. None of the proposals, however, garnered strong support from the participants. One of CONFU's objectives was to cover fair use of electronic materials in educational settings [23].

CONFU offered no solid guidance concerning online course materials. Since this subject matter is so new to our legal system, CONFU hardly even addressed it. Instead, CONFU participants decided to let present fair use standards as interpreted by the courts dictate most educational situations. Thus, the problem with CONFU is that it left distance-learning teachers without clear online guidelines.

2. Fair Use Today . . . Still Fair?

What actually constitutes fair use remains unclear. Also complicating the matter are new and challenging digital advancements. Section 110 (1) of the Copyright Act permits most face-to-face uses. Copyright holders, however, have exclusive rights to the public display and the public performance of their works. Table 2 shows some common classroom allowed and disallowed activities gleaned from past statutes as well as case law:

Permissible Uses	Impermissible Uses
Unlimited, non-dramatic performances of music or literature (i.e., reading novel excerpts and musical lines)	Dramatic performances of musicals or literary works
Unlimited displaying of charts, graphs, or photographs, including stills of motion pictures (distance education included)	Copying coursepacks for class distribution without meeting fair use criteria for each material used
Copying out-of-print-books	Placing out-of-print books on the Web
Posting journal article to Web page (restricted access, students, and faculty)	Photocopying and placing textbook on the Web (even if password or pin provided)

Placing of book on reserve in library	Copying of book and placing on reserve in library
Showing videotape for classroom instruction	Copying videotape for classroom instruction and/or charging fees
Broadcasting or re-broadcasting classroom presentation to home or office (including the showing of another's video if permission is obtained)	
Videotaping of classroom (teacher's or student's) presentation	
Using text, video, audio, and/or photographs in telecourse for enrolled students	
Televising course via cable television if institution- controlled audience (i.e., student body)	
Providing remote access of searchable database via the Internet if institution-controlled audience	
Placing student project on the Internet with restricted access to other students	
Using commercial, instructional videotape on cable television or two-way interactive video	
Using commercial, instructional videotape on cable television or two-way interactive video (via Internet, access restricted)	
Taping on-air television program to be shown on cable television or via two-way interactive video (remote sites allowed to record class to avoid possible technical difficulties)	

Table 2. Permissible and Impermissible Uses of Copyrighted Materials.

There are several cases of note that provide guidance regarding the use of materials for instructional purposes even though they do not deal directly with education. For example, in 1991 the court in Basic Books, Inc. v. Kinko's Graphic Corp. [24] held that a commercial copy shop that copied coursepacks was not entitled to the right of fair use. In 1996, with Princeton University Press v. Michigan Document Services [25], the court held that photocopying by a for-profit corporation's lab scientist did not constitute fair use. It is interesting to note that one of the three dissents in this case favored the making of multiple copies by professors in classroom situations. The court did not, however, address the issue. To add to the confusion, recent Congressional legislation does not provide clear guidance on such issues as downloading, posting, and web-site linkage. Future court decisions as well as possible legislation by Congress will be needed to address these matters.

II. TECHNOLOGY . . . UNWEAVING THE TANGLED WEB

A. Overview

In the realm of computer-mediated instruction, an area of growing concern to educators, there has been little judicial guidance. Most case law deals with corporate liability regarding copyright infringement such as the NetCom case (see section B3 below). Some scholars claim that the Internet has provided an escape from copyright legalities, that the statutes and cases are too archaic to be applicable to such innovative ways of communicating as the information highway. This argument has, however, had little effect upon Congress in the consideration of laws, nor have many in the field given it much credence.

B. Distance Learning

Distance learning refers to the delivery of educational materials that occurs when course instruction is in a non-traditional setting [26]. Examples of transmissions that fall into this category include audio, video, motion picture, cable television, microwave, and, of course, the Internet. Although the Copyright Act governs performances and displays of works, the educational use and transmission of copyrighted information requires additional legal guidance, especially when distance learning is involved.

1. Concerns for the Digital Millennium Educator: Institutional Policies and Procedures

Several institutions have addressed copyright law by implementing measures via hard copy or the Internet [27]. At conferences nationwide, educators have expressed to me the need for institutions to provide offerings in these areas, and some colleges and universities do offer courses or seminars on such intellectual property matters. In addition, there are many excellent resources available to those not familiar with these issues (see Table 3). The most complete resource I have found is by the State Copyright Regents Committee's Office of Legal Affairs at the University of Georgia. Using a series of questions and answers dealing with everything from unpublished letters to out-of-print books, it covers such topical areas as research, writing, multimedia projects, and video/sound recordings. The site also provides such useful scenarios as professors scanning articles from copyrighted journals and adding them to their web pages, showing copyrighted motion pictures for instructional purposes, copying videotapes for classroom instruction, and developing telecourses utilizing copyrighted materials. This site presents a good general overview of copyright law. Also, the Copyright Clearance Center has a free handout entitled "Guidelines for Creating a Policy for Copyright Compliance" [28].

University	Notes	URL's
University of Georgia	"The Regents Guide to Understanding Copyright and Educational Fair Use"	http://www.usg.edu/admin/legal/copyright/ and http://www.peachnet.edu/admin/legal/copyright/copy.html (accessed November 15, 2002)
Indiana University-Purdue University Indianapolis and Indiana University	The Copyright Management Center serves both institutions. It has everything from fair	http://copyright.iupui.edu/ (accessed November 15, 2002)

	<p>use to distance education to library issues and special media issues. Indiana University offers policies as well as sample forms for faculty regarding distance learning and research considerations in general.</p>	<p>http://www.indiana.edu/~rugs/respol/intprop.html (accessed November 15, 2002)</p>
<p>University of Texas</p>	<p>"Guidelines for Classroom Copyrighting of Books and Periodicals," adapted from the Association of American Publishers and the Author's League of America.</p> <p>The University System also has wonderful copyright presentations via the Web.</p> <p>Check out "Copyright Law in Cyberspace" at the above site with /nacula.htm finishing the web address after the intellectualproperty.</p> <p>Be sure to visit the copyright management information site at the preceding address, ending in copymgt.htm.</p> <p>Finally, for the beginner, UT has a great site called "Crash Course in Copyright."</p>	<p>http://www.utsystems.edu/OGC/IntellectualProperty/clasguid.htm (accessed November 15, 2002)</p> <p>http://www.utsystem.edu/OGC/INTELLECTUALPROPERTY/cprtindx.htm#top (accessed November 15, 2002)</p> <p>-</p>
<p>Rensselaer Polytechnic Institute</p>		<p>http://www.lib.rpi.edu/services/policies/lawhighlights.html</p>

		(accessed November 16, 2002)
<u>Massachusetts Institute of Technology</u>		http://web.mit.edu/policies/13.1.html (accessed November 15, 2002)
<u>University of Kansas</u>	<u>Found in Part 8 of the document</u>	http://www.kansasregents.org/academic/policy/academic.html (accessed November 15, 2002)
<u>Massachusetts Institute of Technology</u>	MIT also has a good site regarding frequently asked questions on copyright.	http://web.mit.edu/policies/13.1.html (accessed Jan. 14, 2001) http://web.mit/cwis/copyright/faq.html (accessed Jan. 14, 1999)(dated 1995)
<u>North Carolina State University</u>		http://www.lib.ncsu.edu/scc/copyright/copyrightmenu.html (accessed November 15, 2002)
<u>Princeton University</u>		http://www.wfubmc.edu/neurology/copyright/princeton.html (accessed November 16, 2002) (dated 2000)
<u>Cornell University</u>	<u>Also, Cornell is one of the best resources in copyright research.</u>	http://www.research.cornell.edu/CRF/policies/copyright.html (accessed November 15,2002) http://www.law.cornell.edu/topics/copyright.html (accessed November 15, 2002)
<u>Stanford University</u>	<u>Stanford also has excellent guidelines on fair use.</u>	http://fairuse.stanford.edu/ (accessed November 15, 2002)
<u>Yale University</u>	"Copyright Resources Online" is a fantastic summary for anyone interested in these and related issues.	http://www.library.yale.edu/~okerson/copyproj.html (accessed November 15, 2002)
<u>University of Tennessee</u>		http://toltec.lib.utk.edu/~gco/copyright.html (accessed November 15, 2002)
<u>University of Canada at Alberta</u>	See "Copying Right."	www.library.ualberta.ca/copyright/copyingright/index.cfm (accessed November 15, 2002) (dated 1994)

University of Chicago	See "Policy Guidelines for Publishing Networked Information."	http://www.uchicago.edu/docs/policies/publishing-policy.html (accessed November 15, 2002) (dated May 30, 2000)
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Table 3. University Web Resources of various Institutional Policies and Procedures.

2. Web-related Issues

Although concerns exist about linking to a web site without permission, such linkage would probably be beneficial to most businesses. In other words, the mere provision of access to another's site, as long as no one directly steals, gives credibility and free advertising to the company providing the site, especially when people tell others of the organization free of charge. There are, however, other, more important issues involving cyberspace that need to be examined.

Most scholars feel that some issues will remain the constant. In other words, treatment of material on the Web is similar to that of literature. While information on the Web may be protected, it should be noted that copyright protection does not extend to computer systems, processes, and the like. The copyright protections do not cover machinery. Clearly, actions such as browsing, e-mailing, and related practices seem free of major problems. Section 110 of the Copyright Act addresses copyrighted works in relation to distance education; however, the language of the statute has been quite befuddling. Section 110(2) has allowed for the "transmission" of a performance or display but only within defined limits. The code defines "transmit" to mean communicating a performance or display "by any device or process whereby images or sounds are received beyond the place from which they are sent." Note that, prior to 2002, Section 110(2) allowed displays of nearly all works, but it confined the allowed performance to non-dramatic literary or musical works. Thus, a professor might read a book concerning the Titanic aloud, but showing the movie of the same name was quite another matter. When passed in 1976, Section 110(2) involved only television technology. The waters then got murkier when information became capable of being transmitted via the Internet.

3. The NetCom Case

In the case of Religious Technology Center v. Netcom On-Line Communications Services Inc. (referred to as NetCom) [29], Netcom found itself ensnared in a copyright infringement suit. The case centers upon Dennis Erlich, a former Church of Scientology minister, who copied some of the works of L. Ron Hubbard and placed them on Usenet. Erlich accessed Usenet via a Bulletin Board Service (BBS), and Netcom provided linkage. Plaintiffs Religious Technology Center and Bridge Publications, Inc. sued Erlich as well as the BBS operator, Klemesrud, and the Internet access provider Netcom. Although informed of the infringement by the plaintiffs, both Klemesrud and NetCom contended that it would be impossible to prescreen Erlich's postings. Furthermore, NetCom stated that removing Erlich from the Internet would mean affecting hundreds of users of Klemesrud's BBS. The case turned on NetCom's potential liability. The court granted in part and denied in part the plaintiffs' motion for a preliminary injunction against Erlich [30]. In the other opinion [31], the court granted in part and denied in part NetCom's and Klemesrud's motions for summary judgment as well as judgment on the pleadings and denied plaintiffs' motion for a preliminary injunction.

Traditionally, as seen in Playboy Enterprises, Inc. v. Frena [32], copyright infringement has been a "strict liability" offense, i.e., the infringer may be liable for the illegal act even if he neither knew nor had reason to know of it. The plaintiff sued Netcom on three liability theories: direct, vicarious, and contributory. The court held that direct liability was inapplicable in that Netcom did not engage in any action that caused a direct violation of copyright law. The company merely created a copy for a third party. The postings resulted in the creation of copies on Netcom's storage devices, but the creation of the copies as well as the distribution and display of them was done without any volitional act [33].

On the issue of vicarious liability, the court also stated that the plaintiff failed to prove the defendant had the requisite control over the infringer's actions sufficient to show any gain from its action. On the issue of contributory liability, however, the court held there existed evidence that presented a question of fact as to whether Netcom had knowledge and failed to take appropriate action. The plaintiff had informed Netcom of the infringement and the Court held that failure to take said action equates to substantial participation in these instances resulting in potential liability for the storage of data. The Court stated that Erlich had infringed, but the case regarding NetCom was ultimately settled out of court [34].

A link or Uniform Resource Locator (URL) is a destination obviously not copyrightable since it does not represent an expression that is fixed in nature. There is, however, the issue of the accessing of web pages and the problem that arises when one saves a page to the hard drive. This action constitutes the making of a copy, so copyright law is applicable. The crux of the matter is whether or not there is wrongful reproduction of a fixed expression so as to violate the law. Some contend that public domain or fair use standards apply in these instances. Again, the courts will have to deal with this subject matter in the future.

C. Permission: The Rule of the Day

Since copyright law is still muddled when it comes to issues involving teaching, distance education, and the like, obtaining consent is usually a smart thing to do. In fact, it is the best thing to do to ensure legality. For example, whenever materials are being used for commercial or profit purposes, obtaining permission is essential. Most of us forget that educational institutions are here to make money and that such organizations charge fees in distance learning. Not only is getting permission proper netiquette, but it will save dollars down the road and potential loss of employment for those responsible for any infringement. When viewing another's work, one should ask the following questions:

- 1) Does copyright law protect this work?
- 2) Am I trying to use and copy it for myself as my own work?
- 3) Does any exception to the law apply (e.g., fair use)?

When in doubt, one should simply ask permission and, above all, get permission in writing.

D. Legality: Truth or Consequences

Realistically, most educators have never been faced with copyright-related lawsuits

for good reason: in the majority of cases, a cause of action is simply too expensive for the plaintiff to pursue. In the past, only a few suits have been filed against faculty. Nevertheless, there are valid reasons for obedience to the law. For one thing, universities and colleges bear the responsibility of complying with these laws and will most likely be the targets of any deep-pocket legal action. Even though most unauthorized uses are never litigated, if violations are ever discovered, awareness of these intricate rules is very important for both educational institutions as well as teachers.

The consequences of copyright violation are contained in an infringement complaint. Along with civil and statutory awards for each violation, criminal penalties could also be meted out [35]. With the passage of the Digital Millennium Copyright Act (see III below), federal criminal consequences have been revised. In the case of cyberspace, if guidance is not effectively provided, many will find themselves facing legal liability in the future.

III. COPYRIGHT'S FINAL FRONTIER?

A. The Digital Millennium Copyright Act

1. Overview

On October 28, 1998, President Clinton signed a bill providing new game rules for the treatment and respecting of online copyrighted material. The Digital Millennium Copyright Act (DMCA) [36] had served as the subject of debate for many interested in copyright law, but both houses of the one-hundred-and-fifth Congress had given it the green light earlier in the month [37]. The DMCA adds two new chapters to Title 17 as it strengthens international law worldwide and protects domestic technology. President Clinton released the following statement after passage:

I am pleased that the Congress has passed the Digital Millennium Copyright Act. This bill will implement the two new landmark World Intellectual Property Organization (WIPO) treaties that my Administration negotiated. These treaties will provide clear international standards for intellectual property protection in the digital environment and protect U.S. copyrighted works, musical performances and sound recordings from international piracy. American copyright-based industries that produce and promote creative and high-technology products contribute more than \$60 billion annually to the balance of U.S. trade. This bill will extend intellectual protection into the digital era while preserving fair use and limiting infringement liability for providers of basic communication services. [38]

The one-hundred-and-fifty-page document is divided into five titles (see Table 4 below).

Note: Except for Title I (Treaty), each of the following is effective upon enactment:

Title I: Implementation of two (2) treaties dealing with digital issues, copyright protection and management systems (the WIPO Copyright Treaty Act and the WIPO Performances and Phonograms Treaty).

Title II: Limitation of Online infringement liability for ISPs

(Internet Service Providers) (reducing legal uncertainties regarding such items as digital networks, strengthening anti-online piracy, outlining copyright owners' notification procedures, defining university liability, and creating a "safe harbor" for ISPs in four (4) situational activities):

1. Conduits (provision of materials' transmission, routing, and connections)
2. System Caching (temporary or intermediate materials' storage to improve user performance and reduce congestion)
3. User Storage (materials' storage on systems or networks at the direction of users)
4. Information Locators (linkage tools by service providers such as directories, pointers, and/or hyperlinks to facilitate material access)

Note: 1 and 2: transmission must be initiated by a third party.

3 and 4: requires the ISP to be without knowledge or without having reason to know of any infringement, to obtain no direct financial benefit and to not change the materials.

Title III: "The Computer Maintenance Competition Assurance Act"

(formerly H.R. 72) (creation of an exception for temporary computer program reproduction in maintenance/repair).

Title IV: "Miscellaneous Provisions" (distance education, exemption for libraries/archives, ephemeral [momentary] recordings).

Title V: "The Vessel Hull Design Protection Act"

(formerly H.R. 2696) (creation of new, sui generis protections for boat hull designs in a new chapter entitled Chapter 13 of Title 17 of the U.S. Code, effective for two years) [39].

Table 4. A summary of the titles of the Digital Millennium Copyright Act.

2. The DMCA in Depth

Specifically, the Digital Millennium Copyright Act

1. limits copyright infringement liability for Internet Service Providers (ISPs) for the mere transmission of information as a conduit or transient host, provided no knowledge or financial gain is present,
2. establishes guidelines for the removal by ISPs of material from the Internet that appears to be an infringement upon the knowledge by the ISP,
3. limits liability against institutions when faculty members use educational facilities in order to publish materials electronically,
4. makes criminal the circumvention of anti-piracy devices, also known as "little black boxes,"
5. outlaws code-cracking devices but not ones being employed for research, testing, law enforcement activities and related legal means,
6. states that the fair use doctrine remains a viable defense in copyright infringement matters but does not go into much detail,
7. updates the library exemption for facilities to take advantage of digital technology while engaging in activities similar to those for non-digital methodologies,
8. directs the Register of Copyright to consult with educators, copyright owners, and libraries, and to submit recommendations for the promotion of distance education through digital means, and
9. implements two treaties regarding the respecting of copyright laws internationally.

The legislation has significant impact on our international status. Although technically the Senate still must ratify international pacts before governments of the world give credence to the measure, the law does prepare for the ratification and execution of two treaties regarding the World Intellectual Property Organization (WIPO). In December 1996, over one hundred and fifty countries agreed on WIPO at a conference in Geneva on digital information and copyrights. The first treaty addresses digital authors' rights. The second pact focuses upon the Internet and sound recordings. Thirty nations were required to ratify the agreement for it to be effective globally.

Internet service providers, software industry groups, and music/movie companies heralded the DMCA with the support of such leaders as Senator John Ashcroft of Missouri and Representatives Rick Boucher of Virginia, Scott Klug of Wisconsin, and Tom Campbell of California. They were particularly gratified by the DMCA's affording protection against unscrupulous individuals who could possibly make use of the information super highway for stealing and illegally distributing goods such as software, course materials, and websites.

Although many have applauded the efforts of Congress and the President, members of the academic and research communities have mixed feelings about the measure. Some claim the DMCA will hinder concepts of fair use and other acceptable means of validly utilizing copyrighted materials. There are also those who feel the measure stifles operation, free thought, expression, system corrections, etc. Most library

organizations oppose the measure, stating it does not contain many desired provisions. As a result, concerns regarding educational use continue.

Among the groups that communicated concerns about the legislation to Congress were

- the American Association for the Advancement of Science,
- the American Association of Law Libraries,
- the American Association of Legal Publishers,
- the American Historical Association,
- the American Library Association,
- the Digital Future Coalition (DFC),
- the Medical Library Association,
- the Music Library Association,
- the National Education Association,
- the National Humanities Alliance, and
- the Association of Research Libraries [40].

Among the changes, Section 108 of the DMCA now allows libraries to make up to three digital archival copies of published and unpublished materials for storage and retrieval. Previously, one copy was allowed. The DMCA does not, however, provide that these digital copies be made accessible to the public away from library grounds. The copy sent must arrive in analog form, and any copyright notice originally on a work should be included on the copy. If not, the library must provide a legend stating that the work is possibly protected by copyright law.

In spite of these concerns, the attitudes of many are expressed by the Digital Future Coalition (DFC), a forty-two-member organization comprised of non-profit and for-profit entities interested in intellectual property law in the digital era. According to American University Washington School of Law Professor and DFC member Peter Jaszi, "This legislation is a substantial victory for both the creators and consumers of intellectual property because it provides meaningful protection while recognizing the traditional balance between owners' rights and the privileges of legitimate users" [41].

B. The TEACH Act:

Copyrighting the Digital Classroom

1. Overview

On November 2, 2002, President Bush signed into law the 21st Century Department of Justice Appropriations Authorization Act (H.R. 2215), which includes the Technology, Education, and Copyright Harmonization (TEACH) Act of 2001 with

technical amendments to the Copyright Act [42]. On March 13, 2001, the United States Senate Judiciary Committee had met to discuss the measure S. 487 (the Copyright Technical Corrections Act, previously introduced as H.R. 614). Senators Hatch of Utah and Leahy of Vermont co-wrote the bill in order to amend sections 112 and 110 of Title 17 of the United States Code [43]. It gives credence to the report by Marybeth Peters, Register of Copyrights, to extend fair use regarding distance education. The Senate passed the measure in June 2001 [44]. Section 110 of the U.S. Copyright Act includes ten subsections. However, subsections one and two have the most impact regarding the new law [45]. After President Bush signed the TEACH Act, Mark Bohannon, General Counsel and Senior Vice President, Public Policy, issued the following statement: "We welcome the signing into law of the TEACH Act and believe that the Act will play a constructive role in spurring the creation of new, innovative distance education programs We are pleased that the copyright, university and library communities were able to work effectively together to achieve this legislation" [46].

2. TEACH in depth

The TEACH Act calls for safeguards against retention or distribution of copies other than as needed to teach and against interference with technological measures used by the copyright owner. It also permits institutions to upload a copyrighted work onto a server under specific instances as defined by the act and set out below. This will afford opportunities to allow certain schools to show audio-visual works via the Internet and other related means.

The act extends Section 110 to include the performance and display of more works in the distance educational realm by analog as well as by digital means. The TEACH Act amends Sec. 110(2) to broaden permitted uses to include the performance of any work by "reasonable and limited" portions. It also gets rid of the need for a physical classroom, a sort of neutral application regarding medium of information transmission. The act clears up instructional activities exempted in Sec. 110(2) as applicable to analog and digital transmissions, allowing in a limited fashion the reproduction and distribution of copies as part of the automated process of digital transmissions. It also applies technological measures for unauthorized use and access thereto and provides safeguards for copyright owners by requiring institutions using the exemption to promote compliance with copyright law [47].

The American Library Association, the Association of American Universities, and the American Association of University Professors have praised the measure [48]. The act is, however, far from sweeping. It provides flexibility only for accredited, non-profit educational institutions as part of "mediated instructional activities" to utilize Internet sources in the provision of copyrighted materials to distance education students. This means that the materials used directly relate to and/or for assistance in teaching the particular subject matter or course content.

The TEACH Act is far from a cure-all for educators. TEACH affords rights and protections but in a somewhat limited manner. There are indeed qualifications to the applicability of the act, and the following ten points summarize them.

v When one is digitizing analog works, the law mandates that no digital version be already available and the works must be free from technological protections that would prevent their uses as authorized under Section 110.

- v Materials may be uploaded onto a server to be disseminated only to students enrolled in a secure course in accordance with Section 110.
- v The materials cannot be made available to the public especially while the course is not in session.
- v Materials should be made available during “classtime” of a regular course offering.
- v Retention of materials by the institution is permitted to the extent it is necessary for asynchronous instruction thereof.
- v Participating schools would have to utilize technologically sound measures to reasonably prevent those in possession of the materials from using them beyond the class session as well as distributing same in the future [49].
- v The TEACH Act amends Section 112 regarding ephemeral recordings; i.e., copies can be kept solely for transmission purposes pursuant to Section 110(2).
- v Faculty involved in the process must be educated about copyright law according to the act.
- v In general, supervision and policing by the school and instructor are deemed crucial so as to protect the rights of the copyright holder regarding performance or display at the institution [50].
- v The institution must provide notice to students that materials used are or may be copyrighted as well as informational materials concerning copyright on the whole [50].

IV. CONCLUSION

Over the last few years the copyright road has taken several twists. Since the DMCA and TEACH Act will face tests in courtrooms across the country, it appears that it is a bit early to tell how new pieces of legislation will affect copyright on the whole. Perhaps amendments or even further statutory guidelines by the federal legislature will be necessary in order to alleviate concerns. Among the problems is the applicability of the fair use exception so relied upon by web-based educators and many others. If, however, we are to advance in the digital millennium, we must compromise between right and rule, between freethinking and structured regulation. Only time will tell how these changes in copyright law will ultimately affect our activities in the age of electronic education.

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42. The text of the TEACH Act is available at the U.S. Copyright Office web site, <http://thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES:>.
43. Supra n. 39. The Act reads as follows:

AN ACT

To amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of copies or phonorecords of such performances or displays is not an infringement under certain circumstances, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. EDUCATIONAL USE COPYRIGHT EXEMPTION.

(a) SHORT TITLE- This Act may be cited as the Technology, Education, and Copyright Harmonization Act of 2001.

(b) EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS FOR EDUCATIONAL USES- Section 110 of title 17, United States Code, is amended--

(1) by striking paragraph (2) and inserting the following:

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular

part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to--

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution--

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions--

(l) applies technological measures that reasonably prevent--

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination"; and

(2) by adding at the end the following:

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation--

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council

on Higher Education Accreditation or the United States Department of Education;
and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

(c) EPHEMERAL RECORDINGS-

(1) IN GENERAL- Section 112 of title 17, United States Code, is amended--

(A) by redesignating subsection (f) as subsection (g); and

(B) by inserting after subsection (e) the following:

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if--

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if--

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).”

(2) TECHNICAL AND CONFORMING AMENDMENT- Section 802(c) of title 17, United States Code, is amended in the third sentence by striking `section 112(f)' and inserting `section 112(g).

(d) PATENT AND TRADEMARK OFFICE REPORT-

(1) IN GENERAL- Not later than 180 days after the date of enactment of this Act and after a period for public comment, the Undersecretary of Commerce for Intellectual Property, after consultation with the Register of Copyrights, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report describing technological protection systems that have been implemented, are available for implementation, or are proposed to be developed to protect digitized copyrighted works and prevent infringement, including upgradeable and self-repairing systems, and systems that have been developed, are being developed, or are proposed to be developed in private voluntary industry-led entities through an open broad based consensus process. The report submitted to the Committees shall not include any recommendations, comparisons, or comparative assessments of any commercially available products that may be mentioned in the report.

(2) LIMITATIONS- The report under this subsection--

(A) is intended solely to provide information to Congress; and

(B) shall not be construed to affect in any way, either directly or by implication, any provision of title 17, United States Code, including the requirements of clause (ii) of section 110(2)(D) of that title (as added by this Act), or the interpretation or application of such provisions, including evaluation of the compliance with that clause by any governmental body or nonprofit educational institution.

Passed the Senate June 7, 2001.

Attest:

Secretary.

107th CONGRESS

1st Session

S. 487

AN ACT

To amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of copies or phonorecords of such performances or displays is not an infringement under certain circumstances, and for other purposes. <http://thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES:>

44. See Dale Carnevale, [Senate Passes a Bill Extending Copyright Exemption to Online Courses](#),

The Chronicle of Higher Education, June 12, 2001, at <http://chronicle.com/free/2001/06/2001061201u.htm>. Again the U.S. House followed suit in July

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47. See the TEACH Act, located at <http://thomas.loc.gov/cgi-bin/query/z?c107:S.487>; See also Educause at: <http://www.educause.edu/ir/library/pdf/ERM01610.pdf> and the America Library Association at <http://www.ala.org/washoff/teach.pdf>, <http://www.ala.org/washoff/disted.html>, as well as <http://www.ll.georgetown.edu/aallwash/ib0720013.html>. See generally The Technology, Education and Harmonization Act, S. 487, H.R. 614, incorporated into H.R. 2215, 21st Century Department of Justice Appropriations Authorization Act, at <http://thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES>: and <http://www.copyright.gov/legislation/>. Stanford University Libraries has a good summary of recent copyright law and policy at http://www-sul.stanford.edu/geninfo/Provost_Copyright_Reminder.html.
48. See the Association of American Universities at <http://www.aau.edu/intellect/copyri.html> and <http://www.aau.edu/intellect/SA487Test6.27.01.html>. See also the American Association of Law Libraries at <http://www.ll.georgetown.edu/aallwash/ib0720013.html>. Also, the American Library Association's Washington Office has a paper written by Professor Kenneth Crews, Director, Copyright Management Center Indiana University School of Law-Indianapolis, that summarizes the new standards and requirements established by the TEACH Act at <http://www.ala.org/washoff/teach.html>.
49. The type and amount of materials proscribed by the new law consist of whole performances of nondramatic literary and musical works; "reasonable and limited" portions of dramatic literary, musical, or audiovisual work; and displays of works, such as images, in amounts similar to typical displays in face-to-face teaching (e.g., stills). See the State University of Texas at <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>.
50. The State University of Texas provides a handy checklist to judge if an institution is ready to make use of the TEACH Act. Id.