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An Education in ©opyright Law: A Primer for Cyberspace

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The Law of Copyright

Copyright law has been a hot topic of late. This has never been more evident than with the emergence of the Internet as a teaching tool. The Internet was once a research project. Today it is the greatest computer system in the world. Also known as the net or cyberspace¹, this information super highway offers a tremendous amount of material. The information age has created greater concerns about copyright law.

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 work². Some think that registration is necessary or that photocopying requires express permission from the author in all cases. Also mistakes abound as to the defense of copyrights as well as thoughts of the dreaded “copyright police” coming to arrest against alleged infringement violations³. 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. It is reminiscent of our federal or state constitutional protections. For example, even though a constitution could burn in a fire we would not lose the fundamental freedoms contained therein. A closer examination reveals that there are several privileges afforded by copyright law.

What Is Copyright Law?

There are numerous authors who have addressed the subject of copyright law⁴. The reason is that copyright has been around for most of our country’s existence. In fact, the fundamental basis of copyright law stems from the United States Constitution. In Article 1, Section 8, clause 8, we find that the founding fathers wished to promote science and the useful arts by securing an exclusive right to writings. Unfortunately, the fathers did not explain themselves. Perhaps the most important statute in the area of copyright is the Copyright Act of 1976 (The Copyright Act)⁵. It provides 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 they 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 and
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. Note that copyright law, for the most part, is federal in nature. The laws of other countries must be respected. This work will not address foreign jurisdictional matters such as the international Berne Convention, but will primarily focus upon the laws of the United States while making reference to certain treaties and related concepts.

Originality

A major requirement in copyright law is that the work be original in order to have copyright protection. The work must be independently conceived by its creator. 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. However the test is not one of newness. For example, assume a teacher in Orlando writes an article called “Understanding Copyright Law.” Another teacher in Omaha has just completed a very similar article with the same name. Neither knows of the other’s efforts. Both instructors 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 outright copy them verbatim as the likelihood of violation is more clear in these circumstances.

Expressions and Fixation

A key factor 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. Many times 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 so 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 fixation¹¹. Case law is sparse in these areas. Nevertheless one thing is certain: The Internet will provide many issues for courts to decide as a result of our advancing technological capabilities. And, the legislatures will be kept busy as Congress has grappled over many copyright bills of late.¹²

Formalities

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. Thus, 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 does such a work, the employer owns the copyright of it. Or, if the creator sells the copyright it becomes the property of the business or person who purchases it. Faculty should be careful in reading contracts as well as faculty handbook language that may be incorporated by reference into contractual agreements regarding copyright ownership. There is no controlling case law in this area in light of recent legislation.

It is often surprising to educators that no major protocol exists to obtain copyright protection. It is no longer necessary to provide notice (discussed below). Registration, however, is advisable. This is the process by which one informs the U.S. Copyright Office of copyright ownership. The Copyright Office provides simple forms¹³. All that is necessary are filing out the paperwork, a twenty-dollar fee and a copy of your expression. 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

Regarding the length of time that copyright protection lasts on one's work, it 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.

Notice

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

Example: _____ Copyright (or ©) 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.

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 use¹⁷ is also an exception to normal copyright legalities. It allows, in a limited manner, use of copyrighted protected materials in items 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 lower courts errors. One was to treat the market effect factor as being the most important factor. 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 those raising reasonable contentions of fair use. The Supreme Court reversed the Sixth Circuit Court, claiming that it erred in finding copyright infringement against 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.

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

Appendix A

"Oh, Pretty Woman" by Roy Orbison and William Dees

Pretty Woman, walking down the street,

Pretty Woman, the kind I like to meet,

Pretty Woman, I don't believe you, you're not the truth,

No one could look as good as you

Mercy

Pretty Woman, won't you pardon me,

Pretty Woman, I couldn't help but see,

Pretty Woman, that you look lovely as can be

Are you lonely just like me?

Pretty Woman, stop a while,

Pretty Woman, talk a while,

Pretty Woman give your smile to me

Pretty woman, yeah, yeah, yeah

Pretty Woman, look my way,

Pretty Woman, say you'll stay with me

Cause I need you, I'll treat you right

Come to me baby, Be mine tonight

Pretty Woman, don't walk on by,

Pretty Woman, don't make me cry,

Appendix B

"Pretty Woman" as Recorded by 2 Live Crew

Pretty woman walkin' down the street

Pretty woman girl you look so sweet

Pretty woman you bring me down to that knee

Pretty woman you make me wanna beg please

Oh, pretty woman

Big hairy woman you need to shave that stuff

Big hairy woman you know I bet it's tough

Big hairy woman all that hair it ain't legit

Cause you look like Cousin It'

Big hairy woman

Bald headed woman girl your hair won't grow

Bald headed woman you got a teeny weeny afro

Bald headed woman you know your hair could look nice

Bald headed woman first you got to roll it with rice

Bald headed woman here, let me get this hunk of biz for ya

Ya know what I'm saying you look better than rice a roni

Oh bald headed woman

Pretty Woman, don't walk away,	Big hairy woman come on in
Hey, O. K.	And don't forget your bald headed friend
If that's the way it must be, O. K.	Hey pretty woman let the boys
I guess I'll go on home, it's late	Jump in
There'll be tomorrow night, but wait!	Two timin' woman girl you know you ain't right Two timin' woman you's out with my boy last night
What do I see	
Is she walking back to me?	Two timin' woman that takes a load off my mind
Yeah, she's walking back to me!	Two timin' woman now I know the baby ain't mine
Oh, Pretty Woman.	Oh, two timin' woman
	Oh pretty woman

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

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 results regarding photocopying for education and personal use.

Confusing the Issue with CONFU

In October 1996 The Working Group on Intellectual Property Rights in the Electronic Environment under the Clinton Administration proposed guidelines under CONFU, The Conference on Fair Use. CONFU was initiated in September 1994 and ended May 1997. The U.S. Patent & Trademark Office hosted the event. Informal talks regarding over twenty topics of interest occurred. No proposals, however, garnered any strong support by participants. CONFU's objective, among others, was to cover fair use in educational settings regarding electronic materials.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 teachers without a clear online strategy.

Fair Use Today ... Still Fair?

Fair use is still somewhat convoluted. It is unclear as to what actually constitutes fair use. This is especially true in light of the passage of the Digital Millennium Copyright Act and the TEACH Act (see section III, *infra*). Also complicating the matter are new and challenging digital

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advancements. Section 110 (1) of the Copyright Act permits most face-to-face uses. However, copyright holders have exclusive rights to public display and 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	Out-of-print book (placement on Web)
Journal article posted to Web page (restricted access, students and faculty)	Textbook photocopying and placement on Web (even if password or pin provided)
Placement of book on reserve in library	Copying of book and placement on reserve in library
Showing videotape for classroom instruction	Copying videotape for classroom instruction and/or charging fees
Broadcast or rebroadcast of 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)	
Text, video, audio, and/or photographs used in telecourse for enrolled students	
Telecourse via cable television if institution- controlled audience (i.e., student body)	
Remote access of searchable database via the Internet if institution-controlled audience	
Student project placed on the Internet with restricted access to other students	
Use of commercial, instructional videotape on cable television or two-way interactive video	
Use of 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 instructional purposes even though they do not directly deal 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. A similar ruling occurred in 1996 with *Princeton University Press v. Michigan Document Services.*²⁵ Photocopying by a for-profit corporation's lab scientist Chickering did not constitute fair use. It is interesting to note that one of the three dissents favored the making of multiple copies by professors in classroom situations. The court did not address the issue.

To add to the confusion, recent Congressional legislation does not give us clear guidance as to several issues concerning downloading, posting and web site linkage. Future court decisions as well as possible legislation by Congress will be needed to address these matters.

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Technology: Unweaving the Tangled Web

There has been little judicial guidance in the realm of computer-mediated instruction that is so important to educators. 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 a type of escape from copyright legalities. In other words, with the emergence of innovative ways of communicating such law is not applicable to the information highway and the statutes and cases are too archaic. This argument has had little effect upon Congress in the consideration of laws. Nor have many in the field given it much if any validity.

Distance Learning

Distance learning refers to the delivery of educational materials that occurs when course instruction is in a non-traditional setting.²⁶ Examples include audio, video, motion picture, cable television, microwave and, of course, the Internet. The Copyright Act governs performances and displays of works. But, lately, the educational use and transmission of copyrighted information was found to require additional legal guidance especially when distance learning came into play.

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 Colleges and universities offer subjects on such intellectual property matters. At conferences nationwide educators have expressed to me the need for institutions to provide offerings in these areas. There are many excellent resources available to those not familiar with these issues. The most complete resource I have found is by the State Copyright Regents Committee's Office of Legal Affairs at The University of Georgia, www.usg.edu/admin/legal/copyright/. It covers such topical areas as research, writing, multimedia projects and video/sound recordings. It does so by a series of questions and answers dealing with everything from unpublished letters to out-of-print books. The site contains wonderful scenarios such as professors who scan articles from copyrighted journals and add them to their web pages, the showing of copyrighted motion pictures for instructional purposes, copying videotapes for classroom instruction and the creation of telecourses utilizing copyrighted materials. And, it gives 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 Web Resources and Various Institutional Policies and Procedures

University of Georgia

"The Regents Guide to Understanding Copyright and Educational Fair Use"

www.usg.edu/admin/legal/copyright/

Indiana University-Purdue University Indianapolis and Indiana University

The Copyright Management Center (copyright.iupui.edu/) serves both institutions. It has everything from fair use to distance education to library issues and special media issues. Indiana University (www.indiana.edu/~rugs/respol/intprop.html) offers policies as well as sample forms for faculty regarding distance learning and research considerations in general

University of Texas

"Guidelines for Classroom Copyrighting of Books and Periodicals,"

(www.utsystems.edu/OGC/IntellectualProperty/clasguid.htm) adapted from the Association of American Publishers and The Author's League of America.

The University System also has wonderful copyright presentations via the Web. Check out "Copyright Law in Cyberspace." (www.utsystems.edu/OGC/IntellectualProperty/nacua.htm)

Be sure to visit the copyright management information site,

www.utsystems.edu/OGC/IntellectualProperty/copymgt.htm.

Finally, for the beginner, UT has a great site called "Crash Course in Copyright,"

www.utsystem.edu/OGC/INTELLECTUALPROPERTY/cprtindx.htm#top.

Rensselaer Polytechnic Institute, www.lib.rpi.edu/services/policies/lawhighlights.html.

Massachusetts Institute of Technology, web.mit.edu/policies/13.1.html

MIT also has a good site regarding frequently asked questions on copyright,

web.mit/cwis/copyright/faq.html.

The University of Kansas, www.kansasregents.org/academic/policy/academic.html

Found in Part 8 of the document

North Carolina State University, www.lib.ncsu.edu/scc/copyright/copyrightmenu.html

Princeton University, www.wfubmc.edu/neurology/copyright/princeton.html

Cornell University, www.research.cornell.edu/CRF/policies/copyright.html

Also, Cornell is one of the best resources in copyright research,

www.law.cornell.edu/topics/copyright.html

Stanford University

Stanford also has excellent guidelines on fair use, fairuse.stanford.edu/.

Yale University

"Copyright Resources Online," www.library.yale.edu/~okerson/copyproj.html, is a fantastic summary for anyone interested in these and related issues.

The University of Tennessee, toltec.lib.utk.edu/~gco/copyright.html

The University of Canada at Alberta, "Copying Right,"

www.library.ualberta.ca/copyright/copyingright/index.cfm

The University of Chicago, "Policy Guidelines for Publishing Networked Information,"

www.uchicago.edu/docs/policies/publishing-policy.html

Web-related Issues

Concerns have existed as to linking to a website without permission. Such linkage probably would be beneficial to 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. People would be telling others of the organization free of charge. More importantly, there are other 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 regarding 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 before 2002 Section 110(2) allowed displays of nearly all works, but it confines the allowed performance to a non-dramatic literary or musical works. Thus, a professor may read a book concerning The Titanic aloud, but showing the movie of the same name is quite another matter. When passed in 1976 Section 110(2) involved only television technology. The waters then got even murkier when information became capable of being transmitted via the Internet.

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 a former Church of Scientology minister, Dennis Erlich. He copied some of the works of L. Ron Hubbard. Erlich then placed them on Usenet. Erlich accessed Usenet via a Bulletin Board Service (BBS). 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. The plaintiffs had informed both Klemesrud and NetCom of the infringement, but they 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 the NetCom’s potential liability. The court granted in part and denied in part the plaintiffs’ motion for a preliminary injunction against Erlich³⁰. In the other opinion³¹ 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 act³³.

On the issue of vicarious liability the court also stated that plaintiff failed to prove defendant had the requisite control over the infringer’s actions sufficient to show any gain from its action. However, on the issue of contributory liability 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 informed Netcom of the infringement. 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 in 1996³⁴.

A link or URL (Uniform Resource Locator) is a destination obviously not copyrightable since it does not represent an expression that is fixed in nature. There is the issue of the accessing of web pages. The problem 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. There are those who 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.

Permission: The Rule of the Day

Since copyright law is still a bit 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. 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. When viewing another's work 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, simply ask permission and, above all, get it in writing.

Legality: Truth or Consequences

Realistically, most educators have never been faced with copyright-related lawsuits for good reason: 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. However, there are valid reasons for obedience to the law. Universities and colleges bear responsibility of complying with these laws. Most likely they will be the targets of the deep pocket legal action. Even though most unauthorized uses are never litigated, if ever discovered, one must be aware of these intricate rules. This is very important when it comes to our educational institutions as well as teachers.

The consequences of copyright violation are housed in an infringement complaint. Along with civil and statutory awards for each violation, criminal penalties could be meted out³⁵. Federal criminal consequences have been revised with the passage of The Digital Millennium Copyright Act (see III below). In the case of cyberspace, if guidance is not effectively dispatched many will find themselves facing legal liability in the future.

Copyright's Final Frontier? The Digital Millennium Copyright Act

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 served as the subject of debate for many interested in copyright law. Both houses of the one hundred and fifth Congress gave it the green light earlier in the month of October³⁷. 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 divides into five titles.

Note: Except for Title I (Treaty), each the following are 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 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.

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 on digital information and copyrights in Geneva. 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, 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 with the DMCA 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.

Many applauded the efforts of Congress and the President. However, members of the academic and research communities have mixed feelings about the measure. Some claim the DMCA would hinder concepts of fair use and other acceptable means of validly utilizing copyrighted materials. Concerns regarding educational use continue as a result. There are those who also cite the measure stifles operation, free thought, expression, system corrections, etc. Most library organizations opposed the measure, stating it does not contain many desired provisions.

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

The Association of Research Libraries⁴⁰.

For example, 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. However, The DMCA does not 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 give a legend stating that the work is possibly protected by copyright law.

Perhaps the ideas of many are expressed by The Digital Future Coalition (DFC). The DFC is 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

The TEACH Act: Copyrighting the Digital Classroom

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 Act⁴². On March 13, 2001 The United States Senate Judiciary Committee had met

“An Education in ©opyright Law: A Primer for Cyberspace,” Robert N. Diotalevi. *Library Philosophy and Practice*, Vol. 6, 14 no. 1 (Fall 2003) This article was previously published in LIBRES, vol. 13, issue 1 (March 2003) (libres.curtin.edu.au/libres13n1/index.htm)

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 Code⁴³. 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 2001⁴⁴. Section 110 of the U.S. Copyright Act includes ten subsections. However, subsections one and two have the most impact regarding the new law⁴⁵. After President Bush signed the TEACH Act, Mark Bohannon, General Counsel & 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

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 as well as permitting 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 Internet and other related means. Let us examine how this is to be achieved.

The Act extends Section 110 as to the expansion of uses allowed to include the performance and display of more works in the distance educational realm, by analog as well as 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 so to speak. 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 created as part of the automated process of digital transmissions. It also applies technological measures for unauthorized using and access thereto and permits safeguards for copyright owners by requiring institutions using the exemption to promote compliance with copyright law⁴⁷.

The American Library Association, The Association of American Universities and The American Association of University Professors have praised the measure⁴⁸. The Act is far from sweeping. It provides flexibility only for accredited, non-profit educational institutions as part of “mediated instructional activities” to use Internet sources in the provision of copyrighted materials to distance education students. This means that the materials is used directly relates 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 somewhat of a limited manner. There are indeed qualifications to the applicability of the Act The following ten points summarize them:

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

Materials may be uploaded onto a server to be disseminated only to students enrolled in a secure course in accordance with Section 110;

The materials cannot be made available to the public especially while the course is not in session;

Materials should be made available during “classtime” of a regular course offering;

Retention of materials by the institution is permitted to the extent it is necessary for asynchronous instruction thereof;

Participating schools would have to use 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

The TEACH Act amends Section 112 regarding ephemeral recordings, i.e., copies can be kept solely for transmission purposes pursuant to Section 110(2);

Faculty involved in the process must be educated about copyright law according to the Act;

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 and,

The institution must provide notice to students that materials used are or may be copyrighted as well as informational materials concerning copyright on the whole⁵⁰.

Conclusion

Over the last few years the copyright road took several twists. 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 will be necessary by the federal legislature 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. However, if we are to advance in the digital millennium, we must compromise between right and rule, between freethinking and structured regulation. Only time will tell as to how these changes in copyright law will ultimately affect our activities in the age of electronic education.

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13. 17 U.S.C. §§ 408 and 409. The United States Copyright Office: Phone: 202-707-3000 (person); Phone: 202-707-9100 (publications); Fax: 202-707-2600; E-mail: LISTSERV@RS8.loc.gov. To subscribe to the Newsnet Issue services, put "Subscribe US Copyright" in the body of the message; Web: lcweb.loc.gov/copyright.
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41. The Digital Future Coalition, www.dfc.org/dfc1/Archives/wipo/pr101698.html. See generally the DFC's DMCA Index at www.dfc.org/dfc1/Active_Issues/graphic/DMCA_index.html. The DCF also has a timeline for the DMCA located at www.dfc.org/dfc1/Active_Issues/graphic/graphic.html. The DMCA is not without its critics or case law. For a list of court cases involving the DMCA, see The Anti-DMCA web site anti-dmca.org/docs.html.
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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--

`(I) 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.

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 chronicle.com/free/2001/06/2001061201u.htm. Again the U.S. House followed suit in July 2002. See also Andrea Foster, [House Committee Votes to Ease Copyright Restrictions on Distance Education](#), The Chronicle of Higher Education, July 18, 2002, at chronicle.com/free/2002/07/2002071801t.htm.

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46. See The U.S. Copyright Office at www.copyright.gov/title17/92chap1.html#110, The Copyright Management Center at Indiana University-Purdue University at [www.copyright.iupui.edu/sec110\(2\).htm](http://www.copyright.iupui.edu/sec110(2).htm) and Cornell University School of Law's Legal Information Institute at www4.law.cornell.edu/uscode/17/110.html.

47. See The TEACH Act, located at thomas.loc.gov/cgi-bin/query/z?c107:S.487; See also Educause at:

www.educause.edu/ir/library/pdf/ERM01610.pdf and the America Library Association at

www.ala.org/washoff/teach.pdf, www.ala.org/washoff/disted.html, as well as

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 thomas.loc.gov/cgi-bin/query/z?c107:S.487.ES; and

www.copyright.gov/legislation/. Stanford University Libraries has a good summary of recent copyright law and policy at www-sul.stanford.edu/geninfo/Provost_Copyright_Reminder.html.

48. See The Association of American Universities at www.aau.edu/intellect/copyri.html and

www.aau.edu/intellect/SA487Test6.27.01.html. See also The American Association of Law Libraries at

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 www.ala.org/washoff/teach.html.

48. 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 (i.e. stills, e.g.). See The State University System of Texas at www.utsystem.edu/ogc/intellectualproperty/teachact.htm.

49. The University of Texas System provides a handy checklist to judge if an institution is ready to make use of the TEACH Act. *Id.*