Thank you for this opportunity to appear before the Distance Education and Training Council (“DETC”), and for your kind introduction. By way of further background, I am the son of a highly esteemed law professor (now deceased) who devoted his entire professional life to teaching. My wife has been a high-school teacher during her whole career. And, I am an Adjunct Professor at two Washington, D.C. area law schools – Catholic University’s Columbus School of Law and George Mason University School of Law. I have “education” in my blood. I hope you will consider me as one of you.

But, I am also a copyright lawyer and a civil libertarian. For over ten years, I served as the Chief Counsel for intellectual property and civil liberties issues for a Judiciary Committee subcommittee of the U.S. House of Representatives. In private law practice, I have continued to focus on these issues. Presumably, that is why I was invited to appear before you.

My fundamental message is that education, copyright and privacy can co-exist and derive strength from each other. All three have deep and historic roots in respect for human rights. The more access individuals have to knowledge, the more they will be equipped to contribute to society and the more empowered they will be to pursue their dreams and aspirations.

In my remarks, I hope to accomplish two objectives: first, to provide a primer course on copyright and privacy laws; and second, to discuss sound policies for addressing copyright and privacy issues.

Introduction

As you know, distance education is “hot.” Distance education utilizes many forms of media to varying degrees. It includes mail, radio, television, satellite, broadcasts, video cassettes, facsimile, teleconferences, and the Internet. Electronic networks, interactive working and proprietary databases have become salient factors. Support materials include written correspondence, textbooks, course packs, TV and radio programs, audiotapes, and CDs, and, of course, a teacher is still necessary. The
most fundamental definition of distance education is fairly simple: it is a form of education in which students are separated from their teachers by time and/or space.

“Education, anytime, anywhere” has become a catch-phrase of a major trade association – the Software Information Industry Association (“SIIA”) – which also reports that changes in education technology represent one of the six most important trends in the digital economy.\(^1\) SIIA predicts that the market for technology delivered training (that is, electronic learning) will increase by more than 10 times its 1998 level by 2003.\(^2\)

As experts in distance education, you know that it is a global phenomenon. For copyright lawyers, the amplitude of distance learning nonetheless catches us by surprise. One of the distance education’s pioneer institutions, Great Britain’s Open University, even held a virtual commencement! Now, the revered University of Cambridge, in Great Britain, has taken initial steps to offer (with a giant publishing and media company) an executive distant-M.B.A. The U.S. Army has announced plans to provide all its soldiers, even those stationed overseas, with laptops and distance education courses. Asia is already the home of the greatest number of distance learners in the world.

Bearing in mind its broad definition, distance education is not a new phenomenon. At the birth of the nation, nearly everyone in America lived on the farm or in some little village. With the extension of suffrage to all classes of society, the country experienced a connection between the pursuit of life, liberty and property and the improvement in the cultivation of the body politic’s intellectual energies. In a statement to the State legislature in 1826, Governor De Witt Clinton observed that “the first duty of government, and the surest evidence of good government, is the encouragement of education.”\(^3\) In 1840, Sir Isaac Pitman, the English inventor of shorthand, had an equally brilliant idea about the delivery of educational instruction to an almost unlimited audience: correspondence courses by mail.\(^4\) The U.S. National Land Grants began in Ohio in 1802 and provided support and land for the endowment of a state university within each new state, supported the principle of higher education for all state residents; the Land Grant Universities in turn stimulated the establishment of university extension courses. The Chatauqua movement, with roots in the late 1800’s, pioneered the growth of correspondence courses and reading circles. By the turn of the 19th Century, universities like Penn State were offering distance education programs through the U.S. Post Office, which had just begun the delivery of mail to rural areas.

In the Internet space, American educational institutions do not want to be left behind. The number of distance learning courses by postsecondary institutions has more than doubled in recent years.\(^5\) The Internet makes the “virtual” classroom life-long learning and very attainable goals.

Like the majesty of far off mountain ranges, distance education presents a serene landscape. Educators are key players in the information revolution. Educators connect students to content, and bring publishers to the classroom. Educational institutions give copyright owners the means through which they might offer academic materials for sale. The Internet empowers individuals to take control of, and accept responsibility for, their learning. The high-tech community is able to sell its wares: hardware and software, as well as high-speed access. Publishers benefit through the preparation and publication of educational materials.

However, a closer view presents a turbulent scene. Without an accredited educational institution to prepare curricula, to administer, and to grade (if necessary), the system is meaningless. Distance education is an expensive proposition with many hidden costs. Unexpected costs create a
powerful incentive to cut corners. The traditional structure of education or traditional academic policies may not be adequate to accommodate new forms of distance education. Administrators and teachers argue about copyright ownership. Student plagiarism spirals upwards.\textsuperscript{6}

As you survey this scene, prepare for a safety check in two areas, copyright and privacy by asking five questions:

- Does your institution have written \textit{copyright} policies?
- If so, have those policies been reconsidered in light of changes posed by distance education technologies and new learning modalities?
- Does your institution have written \textit{privacy} policies to protect personal information of students?
- If your institution provides any financial services to students, obtains information from children (13 years or younger), or maintains any health records of students, has it complied with recent Federal statutory enactments?
- Has your institution dealt with technological measures, such as encryption, designed to protect information and/or copyright management information systems?

Depending on your answers, the “fasten seat belt” sign of potential liability for copyright, trademark, related intellectual property infringements, or privacy violations may be illuminated.

Policy-makers are cognizant of the dangers. Section 403 of the Digital Millennium Copyright Act (“DMCA”), which was enacted into law on October 28, 1998, required the Copyright Office to submit to the Congress, “after consultation with representatives of copyright owners, non-profit educational institutions, and non-profit libraries and archives, . . . recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of the copyrighted works.” After extensive research, hearings and solicitation of written comments from the public, the Office issued its detailed report in May of 1999.\textsuperscript{7} The Report provides a very useful compendium of the history and status of copyright protection and distance education and makes several recommendations for changes in current law. The Office finds a clear connection between copyright and distance education: “[t]oday’s digital distance education programs involve copyrighted works being used in new ways, providing new benefits for students and teachers but also posing new risks for copyright owners.”\textsuperscript{8} Congress passed a recent law to protect financial services privacy that may have applicability to for-profit and non-profit educational institutions that offer certain financial assistance to student-customers.

I. The Digital Environment Implicates Copyright, Privacy and Other Rights.

The so-called “information superhighway” is much more than the Internet. It includes the information and content that circulate on the highway – whether in the form of the written word, class notes, a photograph, a song, a sound recording, computer software, database, slogan, logo, trade name, possibly even a method of doing business, or personal data. It contains the infrastructure – the hardware, software, wires, lines, routers, switches, telephones, modems and computers – that connect users, businesses and users (including educational institutions, teachers and students), and businesses with each other.

The information superhighway presents opportunities for creators and information owners, educational institutions, and the public as well. The ultimate purpose of our intellectual property law is
to expand the pool of information and knowledge available to the society as a whole, by stimulating creativity in a free market economy. The ultimate goal of our educational system in a democracy, to advance the welfare of the people, is consistent with that purpose. Learning institutions generally interpret copyright law so as to encourage the discovery of new knowledge, to facilitate the dissemination of knowledge to students, the profession and the public, and to promote the common good. But, sometimes copyright and educational goals conflict with each other, in part because those who create and invest in intellectual property deserve a degree of certainty (financial rewards) gained through protection of their works and in part because those who teach want to benefit (freely or at low cost) from the knowledge pool. The development of new instructional technologies has fueled these kinds of conflicts.

The digital environment is conducive to copying. And violation of intellectual property and privacy rights is becoming easier. Many digital activities such as saving, downloading, caching, framing, linking, archiving, viewing, accessing data, merging and transmitting are forms of copying. Some of these activities are necessary for the operation of the personal computer and the Internet; others amount to downright theft. People use Napster for flagrant piracy, but Napster also may have a legitimate file sharing function. In any event, a student can gain access to a wide range of protected materials and can easily copy or communicate that material with the click of a mouse pad or a key stroke. Fraudulent duplication, plagiarism, diluted textual integrity, and infringement can become the norm rather than the exception.

Frequently, the relationships among the intellectual property owner, publisher, educator, and user become blurred. For example, students conduct research on-line and are able to download written text from others for inclusion in homework assignments. Sometimes, without permission, students post lecture notes on the Internet. Teachers prepare course packs, merging different works into one document. Copyright ownership questions arise.

The thought that the digital era, particularly the Internet, has made copyright law outmoded is attractive to some. Witness the writings of Professors Nicholas Negroponte and Lawrence Lessig who argue that copyright is outmoded. But unless Congress changes the law, the attractiveness of “the copyright is dead” thought is illusory and dangerous. A less radical course lies in understanding copyright, and other intellectual property concepts, so the twin dangers of infringement and liability can be avoided.

II. Intellectual Property in Cyberspace: While Benefits Are Enjoyed, An Educational Crash Course is Needed.

Copyright is “the least understood and most dangerous area of distance learning.” Danger can be reduced by making Websites safer. Understanding can be promoted through educational sessions like this one.

The two words “intellectual property” are daunting not because of the noun “property,” but because of the adjective “intellectual.” The forms of intellectual property – copyrights, trademarks and unfair competition, false advertising and deceptive trade practices, patents, trade secrets, and the rights of publicity and privacy – create rights in the same sense as real property (think of your house, car or land).
But intellectual property differs from real property in certain important regards that derive from its “intellectual” nature. It is abstract and incorporeal. It is not normally exhausted through use. The popular film figures and comic books of the early 1920’s through the 40’s – Mickey Mouse, Superman, Batman – are still protected. Intellectual property is transferable, but the transfer of the material object in which it is incorporated does not convey the intellectual property itself. It restricts many activities not associated with the material object to which it is attached. It is often divisible, with one right being conveyed or licensed and others retained. Due to these characteristics, protection of intellectual property is sometimes more difficult than protection of real property. For example, a copyright may be infringed many thousands of miles from the owner and without the owner ever being aware of the wrong. By the same token, an infringer may not even be aware of the infringement.

All forms of intellectual property provide incentives to individuals to create either works of art, literature, products, processes or services. These incentives operate to reward creativity. Authors (and inventors) reap these rewards. Distribution interests – in the form of publishers, printers, photofinishers, broadcasters, cable television operators, satellite carriers, Internet service providers, and others – benefit from increased consumer traffic. Users – schools, students, libraries and the public – benefit from the fruits of creativity. Through a “political utility” approach to the enactment of intellectual property laws, employed by the Congress and occasionally the state legislatures to enact exceptions for and limitations to the grant of rights to authors, inventors and intellectual property owners, the public is generally viewed as the ultimate beneficiary of the intellectual property system.

In the U.S. Constitution, the founding fathers of this nation eloquently and tersely authorized Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Copyright and patent laws, the two principal forms of intellectual property enacted pursuant to this provision, provide rewards for those who author works and create inventions. The constitutional text evidences the balanced “political utility” methodology. Copyrights and patents have limited terms and must meet certain originality and inventiveness standards to qualify for protection. Elected representatives of the people make the policy decisions.

Intellectual property rights are not absolute. In addition to constitutional requirements, Congress has created statutory safety valves. All forms of intellectual property contain provisions that permit competitors and users a certain amount of leeway to benefit from and improve upon prior creativity and inventiveness.

Debates about copyright law can be fierce and emotional. As aptly observed by Professor Paul Goldstein, “[e]very major clash over copyright in the United States, at any rate, is at bottom a clash between the view that copyright’s cup is half full and the view that it is half empty.” I can speak to that proposition first hand; I bear the scars.

Distance education, essentially composed of copying a work (words, designs, graphics, photographs, charts and so forth) and transmitting the work, implicates important elements of intellectual property law, including the safety valves. A distance education administrator or teacher should be able to recognize these elements as tools of the trade.

Copyright law. Without question, copyright is the body of law that most affects educational institutions. Copyright law governs the ownership and use of works of the printed word, literature, the visual arts and music. Since this country’s first copyright law in 1789, the basic goal of copyright has
been to enrich our society’s wealth of culture and information. Copyright law’s antecedents are deeply rooted in English history wherein the term “copyright” meant exactly what it said: the right to make copies of a given work. At first, a “work” simply meant a written work (e.g., books, maps and charts) but over the past three centuries, “work” has been expanded to include photographs, computer software, sound recordings, movies and television programs, architecture, sporting events, dance, pantomime, and virtually any form of expression fixed in a tangible medium. Similarly, the exclusive rights of the author or owner have expanded to include not only the right to copy (reproduce), but also the right to distribute, perform, display and create adaptations. Because these rights are divisible, one right may be licensed and the others retained. A “first sale” may occur but all rights are not “purchased.” A copyright infringement may cover more than one right and may implicate the rights of more than one party. Copyrights, although limited in the duration of protection, are quite long-lasting (life of the author plus 70 years; in the case of an anonymous work, a pseudonymous work, or a work made for hire, for a term of 95 years from first publication, or a term of 120 years from the year of its creation, whichever expires first. One significant advantage to authors and owners is that a copyright is created without resort to any administrative formalities, although registration and notice provides palpable benefits. The lack of a registration system can make due diligence difficult for an educational institution because there is no central repository of information about what works are protected. After the term of protection has run, the public domain is enriched.

Lest you be overly fearful of falling innocently and unwarily into these copyright infringement traps, copyright law contains numerous safety valves that restrict the scope of rights, limit the exercise of rights, or excuse infringements altogether. These safety valves have special applicability for educational activities:

- Copyright protects only a work’s expression, and not its underlying ideas. 
- Copyright law has special provisions designed for educators, permitting various uses relating to face-to-face teaching and instructional broadcasting.
- The “fair use” doctrine allows the copying of copyrighted materials if done for a beneficial purpose such as teaching, criticism or news reporting.
- Educational businesses or institutions that serve as on-line service providers or operate Websites may benefit from several provisions in the copyright law.

Attempts have been made to provide greater certainty for teaching activities and copyright owners under the fair use section of the Copyright Act through the crafting of guidelines as to how fair use applies to educational activities. For example, following in the immediate wake of the Copyright Revision Act of 1976, guidelines were negotiated by interested parties to address several types of educational uses: analog classroom photocopying, educational uses of music, and off-air taping of broadcast programs for educational purposes. Guidelines form a “safe harbor” of sorts that substantially reduces the risk of a lawsuit.

In the DMCA, Congress enacted provisions relating to on-line service provider liability. Educational institutions today may act as a service provider rather than as the originator of a transmission, and therefore be eligible for the safety of the DMCA’s limitations on liability. In order to qualify, a service provider must (1) adopt and reasonably implement a policy of terminating subscribers who are repeat infringers; (2) accommodate and not interfere with technical measures used to protect and identify works; and (3) for certain activities, register as a service provider in the Copyright Office.
A beneficial step in understanding copyright law is to set it apart from other intellectual property law. Most people do not understand the difference between a copyright, trademark, or patent. Intellectual property lawyers often receive requests to copyright a name, or to trademark a song.

**Patent law.** Patent law protects new and useful products and processes by granting inventors the right to prevent others from making, using, selling, offering to sell, or importing their invention in the United States. In this regard, patents are arguably the strongest form of intellectual property. Patent law conditions the granting of a patent on an inventor’s full disclosure to the public of the claimed invention and the best mode of practicing it, so that the public may become knowledgeable about the patent. Such disclosure is accomplished after rigorous examination of a patent application and the prior art by a government agency, the U.S. Patent and Trademark Office. Patent rights are fairly limited in duration (twenty years from filing an application) in comparison to other forms of intellectual property. After the term of protection ends, the invention enters the public domain. With the recent granting of patent rights in methods and processes, many of which are incorporated in software programs, educational institutions may violate patents through the purchase or licensing of infringing products.

**Trademark and unfair competition laws.** Trademark and unfair competition laws, which protect words, symbols, designs or pictures that identify the source of goods or services, are also very important to education entities. The indicia of source protected by trademark and unfair competition laws enable consumers to exercise choices among competing brands and, therefore, play a critical role in the commercial marketplace. A “strong” brand may attract customers and hold investors. Through trademark protection, a company or institution can develop and maintain consumer goodwill. Protection is limited to the use of words, devices and symbols in connection with specified products or services so that others are not deprived of fundamental means of expression. Trademarks must be distinctive and not merely descriptive. As the distinctiveness of a product or service becomes stronger in the minds of consumers so does the brand or mark. A trademark can exist in perpetuity as long as it is protected by its owner.

**False Advertising and Deceptive Trade Practices.** Closely related to trademark law and unfair competition are false advertising and deceptive trade practices. Federal law (section 43(a)(1) of the Lanham Act) prohibits advertising that misrepresents another person’s goods, services or commercial activities. As compared to trademark law, a likelihood of confusion between trademark-identified goods or services is not necessary to succeed in a false advertising claim. It is satisfactory if the advertising statement is literally false or creates a misleading impression. Deceptive trade practices arise pursuant to state laws and for the most part require some likelihood of confusion or misunderstanding as to source, sponsorship, approval or certification of goods and services.

**Trade secret law.** It sometimes pays to keep a few things secret. The law of trade secrecy creates property rights in a company’s invention or other proprietary information so long as the invention or information remains secret, valuable, and gives the company a competitive advantage. Databases, such as customer or enrollment lists, are sometimes protected as trade secrets. Trade secret rights, although certainly potent, may not be as powerful as other intellectual property rights. In the on-line context, the culture of trade secrecy is the culture of a slower world. The owner of a trade secret may only prevent others from usurping or using a trade secret when obtained by others through “industrial espionage,” breach of a confidentiality agreement, or some other form of improper conduct. Trade secrecy protection does not prevent others from obtaining the secret through legitimate research, independent discovery, or reverse engineering. Finally, trade secret protection is lost when an invention or information is made public, such as through the issuance of a patent.
**Right of publicity.** The right of publicity encourages persons – often famous and well-known sports and entertainment figures – to make their likenesses available to the public for commercial purposes. Publicity rights also allow individuals to control commercial use of their identities, through photography, voice, and other means. Publicity rights issues frequently arise in advertising, and in marketing activities that rely on the mixture of written text and photography, or multimedia (including audio and audiovisual works). Publicity rights do not trump the First Amendment, and broad exceptions exist for educational, political and other expressions. For example, it is permissible to teach a course in contemporary literature and show photographs of living authors. But an educational Website should not use unauthorized photographs or banner ads with photo likenesses or names to attract customers. The right of publicity bears close relation to the right of privacy. In the digital era, where photographs can be scanned into computer memory and transmitted electronically, careful heed must be paid that the rights of those photographed are not violated.

**III. Privacy Rights Are Violated All Too Often in Cyberspace.**

The right to privacy, as a philosophical or moral construct, incorporates so many different concepts and interests that a precise definition is elusive. Being so vast in scope, a single word does not do it justice. Like the words “freedom” or “liberty,” the word “privacy” describes subjective values, not precise or measurable ones. Most Americans, however, know privacy when they “see” it. Or they know it when they “lose” it. They can certainly describe the functions it serves. Privacy, as a human right, is central to dignity and critical to a sense of autonomy. Privacy also means the right to control information about oneself, even after sharing it with others. Today, electronic databases of personal information (which are composed of information that identifies an individual such as a name, address, Social Security Number, telephone number or photograph, but can also include sensitive information about examination grades, medical or disability conditions, racial or ethnic origin, or political beliefs) are widespread. Many entities, even the states, maintain databases and sell or lease personal information to individuals and businesses for downstream use. Use of, reliance on and distribution to others of those databases by educators may raise serious privacy implications.

*Although the U.S. Constitution does not explicitly mention any right of privacy for Americans, privacy is nonetheless a treasured value and recognized right.* In a long line of cases going back more than a century, the U.S. Supreme Court has recognized that a constitutional zone of personal privacy does exist. The right can be derived from certain provisions in the Bill of Rights, such as the right to free association that emanates either from the First Amendment, the search and seizure clause of the Fourth Amendment, or the Fifth Amendment’s self-incrimination clause, or in the concept of personal liberty guaranteed by the Fourteenth Amendment (and its restrictions against state action). In addition to its constitutional ramifications, the legal concept of privacy has evolved to confer upon individuals a degree of control, as an element of tort law, over the dissemination of their personal information by others to the public or the electronic media.

*The societal importance of privacy is also reflected in national legislation.* The U.S. Congress on several occasions has entered the fray, often directing its attention to specific sectors and issues, and sometimes even responding to newspaper headlines and public scandals. However, federal privacy statutes have been enacted mostly in discrete areas. Witness the titles of the enactments: The Fair Credit Reporting Act of 1971, the Right to Financial Privacy Act of 1978, the Electronic Communications Privacy Act of 1986, the Video Privacy Protection Act of 1988 and the Driver’s Privacy Protection Act of 1994 and the Children’s On-line Privacy Protection Act of 1999.
The Driver’s Privacy Protection Act recently upheld by the U.S. Supreme Court, was passed by Congress six years ago in response to the death of Rebecca Schaeffer, the movie actress who was killed by a stalker who had traced her address through a motor vehicle division. The Video Rental Privacy Act passed after a newspaper published the movie rental records of Judge Robert Bork in the course of Senate hearings on his nomination to sit on the U.S. Supreme Court. As a result, video rental records are today afforded more protection than medical records.

The only general federal law that protects informational privacy is the Privacy Act of 1974. Do not be confused by the Act’s grandiose title; it only applies to data processing by the federal government. It does not apply however to state governments nor to the private sector. Many states do not have omnibus privacy laws at all.

In November of 1999, Congress broadly reformed the entire financial services industry and enacted a law (Title V of the Gramm-Leach-Bliley Act) that requires all financial service institutions (defined quite broadly) to make privacy policies available to customers at the time they form a relationship and annually thereafter, and to allow customers to “opt-out” of the privacy system. Educational institutions that provide financial services (both off-line and on-line) to students through debit cards, pre-payments, interest on accounts, and so forth, may qualify as financial institutions and be required to draft customer notices, share them with customers, and respect minimal privacy standards. The regulatory aspects of Gramm-Leach-Bliley took effect on November 13, 2000, but financial institutions have until July 1, 2001 to come into compliance.

In the digital era, characterized by data processing, computer storage, communications monitoring, and Websites, the political pressure for stronger privacy protection is growing. In politics, few issues rise to the high cachet of fighting for a constituent’s individual rights. Today, the national concern has clearly become one of consumer rights vis-à-vis private organizations and businesses. The strength of the political pressure can be gauged by the introduction of almost one hundred privacy bills by members of Congress. The movement for privacy rights transcends politics and party lines, and also extends to the states and overseas.

For the full potential of electronic commerce to be reached, the digital revolution should incorporate some self-regulatory, technical, legal, and perhaps even legislative means to protect personal privacy. A base line of fair information practices has been developed during the past three decades to guide entities that operate in the digital environment. These practices are based in part on recommendations of federal agencies and the adoption of privacy guidelines in Europe. Debate does arise in the private sector about whether the practices go too far or do not go far enough. Most representatives of the business community believe strongly, however, that self-regulation is preferable to government intervention. Others believe, equally strongly, that self-regulation is a sham. A good argument can be made that if minimal, self-imposed standards are not respected and privacy horror stories continue to appear in the news almost daily, Congress will intercede, as will state legislatures.

Privacy standards should include the following characteristics:

- **Openness and notice.** Entities that collect and use personal data should make the existence of data collection systems publicly known, along with a description of the main purpose and uses of the data.
• **Individual participation and access.** Each individual should be allowed to see information about him or herself and to correct errors or remove any data entries that are out-of-date or incomplete.

• **Collection limitation.** Limits should be placed on the collection of personal information. Minimally, information should be collected using lawful and fair means and, where appropriate, with the knowledge or consent of the individual.

• **Data quality and integrity.** Personal information should be accurate, complete, and timely and should not exceed the purposes for which individuals were notified that it would be used.

• **Security.** Personal information should be protected by reasonable technical and security safeguards against risks such as unauthorized access, destruction, use, alteration or disclosure, and comply with relevant regulatory standards.

• **Accountability and remedies.** Recordkeepers should be accountable for complying with fair information practices, and individuals should be accorded a means of redress if harmed by an improper disclosure or use of personal information.

Individuals already have an increasing array of tools with which to protect their personal privacy. Conceivably, the tools could be directed against an educational Website that was aware or should have been aware of, or was not aware of but contributed to, privacy infringements. Even short of a violation, ask yourself whether you could survive a privacy gaffe made public nationwide by the press or consumer advocacy groups.


Intellectual property law confers exclusive rights on an intellectual property (often called “content”) owner. The content owner is then generally responsible for enforcement and administration of the rights. Although government agencies such as the U.S. Copyright Office and the U.S. Patent and Trademark Office are assigned general administrative and policy functions, these agencies do not engage in affirmative protection activities on a case-by-case basis. The content owner generally handles rights protection and clearance.

For certain forms of intellectual property theft, the criminal laws may come into play. Years ago, Groucho Marx was surprised to learn that the unauthorized broadcasting of a movie script was a crime. Students are not beyond the long arm of the penal law, as recently illustrated by the prosecution, and conviction, of a University of Oregon student for massive copyright infringing activities on the Internet. In an attempt to promote investigations and prosecutions, Congress recently boosted criminal penalties and modified existing laws regarding Internet theft. In addition, in the DMCA Congress enacted a scheme to deter (1) the manipulation and deletion of digital copyright management information and (2) the circumvention of various technologies used by content owners to prevent copying activities.

In the civil arena, liability levels are extremely high, and Congress recently raised them again. Statutory damages range from $750 to $30,000, as the court considers just, for each infringement. If a person commits an infringement willfully, the court in its discretion may raise the award to a sum of not more than $150,000 per infringement. A court recently hit an Internet portal, mp3.com, with statutory damages of $25,000 per CD, it having distributed thousands of CDs unlawfully.

Intellectual property laws provide content owners with incentives to litigate, or threaten a lawsuit, in cases of infringement. As a general proposition, legislatures base intellectual property statutes on strict liability. If violators meet certain conditions, courts do not require an intent to infringe.
Establishing infringement intent or willfulness can, however, raise liability dramatically. By the same token, lack of intent to infringe, coupled with no copyright or trademark notice, may result in an “innocent infringement” defense (with a substantial reduction of monetary damages).

Patent law provides an arsenal that can force a business into bankruptcy. Upon a finding of a patent infringement, a court shall award damages adequate to compensate for the infringement, but not less than a reasonable royalty for the use of the invention, plus interests and costs. The owner of a trademark is required by law to police and eliminate unauthorized uses of its mark in order to maintain the mark. Otherwise, the mark may become generic. Intellectual property laws contain provisions regarding statutory damages (eliminating the need to show actual damages, which are also available), the reimbursement of attorneys fees, injunctive relief, and impoundment and forfeiture of goods.

Often, content owners have no choice but to send a “cease and desist” letter. The letter serves as notice of infringing activity and generally opens the door to resolution of the problem – stop the infringement or purchase a proper license. By placing the infringer on notice, the “cease and desist” letter satisfies the intent requirement should infringing activities continue, thereby increasing dramatically the specter of statutory damages. Although an educational institution can handle many activities relating to intellectual property matters without resort to a lawyer, an institution should immediately refer receipt of a “cease and desist” letter to legal counsel.

Finally, due to a recent line of U.S. Supreme Court cases dealing with sovereign immunity, educational institutions that are instrumentalities of a state (e.g., public) can avoid monetary damage awards altogether. However, courts may subject them to injunctive remedies. Further, individual administrators of these institutions may possibly be sued for damages in their personal capacities.


When the heavy metal rock band, Metallica, brought suit against Napster, it also sued three universities, Yale University, Indiana University, and the University of Southern California. The three universities avoided litigation through a combination of prevention and remedial measures.

This is a proper approach. Avoidance in this instance, and generally speaking, is based on a general understanding of the law, as well as the exercise of good judgment and sound business practices in the operations of any commercial or educational enterprise.

Distant educators should adopt the following seven “best” practices and policies as a way to avoid controversy and potential litigation.

1. **Review Existing Intellectual Property and Privacy Policies and Establish an Updated On-line Learning Policy.** Educational institutions that provide distance learning should examine their existing policies (hopefully policies already exist) regarding intellectual property and privacy, and develop or update an on-line learning policy. Like weeding an overgrown garden, the examination may be back-breaking. As recently noted by the American Council on Education, “an on-line learning policy will implicate patent, copyright and software policies, and for some institutions, their trademark, multimedia and videotaping policies.” Arguments and issues will arise about the ownership of distance education courses, third party relationships within the school and faculty, student rights,
accreditation, and liabilities. However difficult, this initial step is a requirement. The following practices and procedures build on it.

Good, loyal and intelligent employees, including faculty, are essential to a successful school. No news there. In addition to hiring good, honest faculty and employees, educational institutions should establish an on-line learning policy that applies to management, faculty, library staff and other employees, such as webmasters and marketing personnel, particularly those with access to digital equipment. These policies should include: (1) rights clearance procedures; (2) notices posted regarding digital copyright on reprographic machines; (3) terms and conditions for the receipt and transmission of materials via the Internet; (4) computer “use”, addressing not only copyright and privacy but also pornography, harassment, defamation, hate-mail and chain letters; (5) procedures for resolving intellectual property problems; (6) procedures to protect privacy; and (7) programs and/or training materials to educate personnel about intellectual property and privacy issues.

A distant educational enterprise should think seriously about designating a particular individual to recognize quality control problems, receive electronic notices of infringing activities, and otherwise serve as a digital intellectual property troubleshooter. Follow the lead of many digital businesses, like the New York Times, Yahoo! and the Walt Disney Company. These companies have designated individuals to receive electronic (i.e., e-mail) notification from injured intellectual property owners who are able to identify infringing materials or activities. Similarly, an individual should be designated as a privacy expert.

2. **Learn to Look for Danger Signals.** Road signs often exist to identify property rights of third parties. These signs are usually in the form of a copyright or trademark notice, usually a small ©, TM or SM, or ®, sometimes with a proviso “all rights reserved” and the name of the owner (like at the top of this paper).

If you find a notice in educational materials with rights designated as belonging to someone besides the teacher, you should not transmit the materials until you are satisfied that the transmission would fulfill the requirements of fair use, you obtain clearance, or you qualify as a service provider pursuant to the DMCA.

Notices, however, are not mandatory. The absence of a notice does not provide a “green light” for all copying or transmission activities. Notices may have been removed by unknown parties. Therefore, the educational institution should handle educational materials containing works or trademarks that appear to belong to someone other than the institution the same as it would treat materials with a clearly marked trademark or copyright.

In the electronic environment, digital files may contain proprietary information internally – such as “headers” related to copyright management—to assist users and others to identify conditions of use, licensing and purchase possibilities. Furthermore, anti-circumvention technologies – watermarking, encryption, and other technologies to protect underlying works –are increasingly being used to protect such files. Already, international treaties and Congress have created substantial incentives (even criminal penalties) for content owners to “post their land” through use of anti-circumvention technologies and copyright management information.
Responsibility will fall on the shoulders of users and distributors, including educational institutions, to recognize and respect these postings. Under no circumstances should you participate in eliminating or circumventing these headers and protective technologies.

Similarly, road signs may point towards personal information of customers and the terms and conditions of use. Learn to recognize those signs; they are not trivial. In January of 2000, the New York District Attorney used privacy policy violations by the Chase Manhattan Bank and Sony Music Entertainment Inc.’s InfoBeat to trigger an investigation that ultimately curtailed their sharing of data.

3. **Where Applicable, Follow Guidelines and Standards Set by Others.** Pursuant to the Copyright Act, guidelines have been developed regarding various educational activities and uses. Under federal law, standards have also been developed regarding privacy. Finally, professional and educational associations, among others, have developed general principles of ethical conduct.

Admittedly, guidelines and standards do not enjoy the force of law. But, operating within a clearly understood set of practices substantially reduces the risk of a lawsuit. Moreover, you should understand that deviation from guidelines may not constitute infringing activity. In the words of the Register of Copyrights, “they are a floor and not a ceiling.”

In 1996, the photofinishing industry, under the leadership of its trade association (the Photo Marketing Association International) developed copyright guidelines. The guidelines are expressly premised on the “belief that litigation is detrimental to the photo industry, and following the guidelines will help avoid it.” The guidelines have been successful; since 1996, only a small number of major lawsuits have been brought against photofinishers. Presumably, the flip side of the equation has also been respected; photofinishers have recognized the photographer or studio as the rightful owner of copyright in the relevant photographs.

In a period when private sector development of industry standards is a much-preferred approach to government intervention, but the specter of intervention is looming, associations like the DETC may wish to develop further guidelines, or to participate with others in the development of guidelines.

4. **Display Your Practices and Respect Them.** Once developed, copyright and privacy policies should be posted on-line. Members of the public may obtain the rules of the road, along with an understanding of the main purposes and uses of a Website. At the same time, on-line companies accept a baseline on which to operate. A two-way street is created. Simple enough.

Not quite; once policies are posted, they must be obeyed by both parties – users and Website owner – to the equation. Practices, whether in the form of terms and conditions, or a user charter, may actually be contractually binding especially if an affirmative click is required or an electronic signature is needed to enter a site. In any event, publicly available policies and practices promote accountability on both sides. They also reduce liability and responsibility for third party activities.

Finally, policies must also be kept up-to-date to reflect changing practices within a company. You cannot do much worse that posting policies that are no longer respected or applicable.

5. **Buy General Liability Insurance.** Some educational institutions have arranged for commercial general liability insurance to protect themselves against certain risks. Traditionally, general
liability insurance has protected entities from bodily injury and real property damage claims alleged by third parties. With the digital revolution and the increasing importance of intellectual property and privacy, insurance companies have created new programs to provide coverage against intellectual property and privacy claims.

Under these policies, an insurance company must pay for the costs (in excess of any applicable deductible) of defending against a lawsuit (which can be substantial) as well as to provide indemnification for damages up to the limit of the policy. For an entity with limited assets, an insurance policy can literally save it from financial destruction even in those instances where the lawsuit is meritless. In addition, the presence of insurance can facilitate settlement of the dispute on terms that are not crippling to the entity.

General liability insurance companies are beginning to develop policies specifically to cover intellectual property infringement or privacy violation suits and to provide those policies to individual enterprises at competitive rates; but the policies are in a state of flux and can be confusing. Many insurance companies are experts in liability claims for real property but lack expertise in intangible property or human rights. Intellectual property or privacy rights insurance are areas in which advice of an experienced coverage counsel may be sought to assess whether a policy is applicable to a particular company’s set of circumstances.

At present, certain insurance coverage for enumerated claims is found under the rubric “advertising injury” coverage set forth in most general liability policies. However, the law relating to “advertising injury” is also changing constantly, with lack of guidance in many jurisdictions being the norm rather than the exception. If litigation does arise, defense counsel should be aware of the possibility of “advertising injury” coverage. Some courts have even suggested that a defense counsel’s failure to consider and advise a client about “advertising injury” coverage could constitute malpractice.

6. **Develop Record Retention Standards.** Whether paper-based or electronic, record retention serves essential business purposes. Billing records form the basis for the payment of taxes, employment records for employee benefits, transactional records for accounting purposes and course materials and enrollment records for accreditation (which, as you know, is necessary as a condition for receipt of federal funds). Memories fade and key employees retire or, in a mobile society, depart for greener pastures. In a dispute, records may be all that a distance education entity has to prove its versions of events or to reconstruct how the dispute arose.

On October 1, 2000, the Electronic Signatures (“E-Sign”) Act went into effect. For electronic commerce, substantial movement has already occurred towards click licensing and Website terms and conditions. Because we can expect distance education to take place mostly in a digital environment, distance educational institutions must pay careful heed to implement properly the requirements of E-Sign which contains substantial consumer protections and record retention requirements.

Record retention can be time-consuming, boring, and complicated. Thousands of federal and state laws, rules and regulations address types of records that institutions must keep and how long institutions should maintain those records. Nevertheless, record retention is a fact of life.

Regarding intellectual property, institutions should retain records as long as the particular statute of limitations requires. For example, there is a three year statute of limitations for copyright
infringements. Pursuant to patent law, no recovery shall be had for any infringement committed more than six years before the filing of the complaint.

The best way to prepare a record retention policy, not only for intellectual property or privacy but for other matters as well, is to plan well in advance. Minimally, any record retention system must respect several long-term considerations: (1) records must be readily available; (2) they must be trustworthy; (3) the system must be documented; and (4) records should be kept no longer than needed.

7. **Treat Others as You Would Want Them to Treat You.** A good rule of thumb for life in general, but also for the digital environment, is to treat others as you would want yourself to be treated. Recognize that any school is a property owner, with a substantial business stake in its commercial activities. Most, if not all, educational institutions have given their enterprises a name, invested in establishing “goodwill” in the name, compiled customer lists, developed techniques for an effective and efficient operation of the enterprise, and operated their businesses in an honest manner. The “Fighting Irish,” “Bucky Badger,” and the Arkansas “Razorback” are worth millions of dollars. By definition, any distance education enterprise has already created a Website, and has embarked on the path of electronic commerce. All have purchased or customized computer software programs. Most have themselves engaged in the graphic arts, or have hired graphic artists to create user-friendly sites or programs. Ask yourself whether you would be upset if an institution used your original work of graphic art without your permission. Ask yourself how you would feel if someone misappropriated or pirated your intellectual property – name, student lists, trade secrets, and so forth.

**Conclusion**

Let us take stock. Thanks to the Internet, we now have a common, global postal system, through which we can all send each other mail. We now have a common global shopping center, in which we can all buy and sell. We now have a common global library, where we can all go to do research, and we now have a common global university where we can all go to take classes.

The traditional lineages between education, business, law, technology and culture are disappearing. Approaching a problem from a simple perspective will be inadequate. Education, copyright and privacy are distant cousins with deep roots in human history. All are directed at the sanctity of the individual in a democratic, and now global, society.

The background and general techniques and strategies discussed here provide distant educators with a blueprint for fulfilling a critical societal mandate while avoiding perils and pitfalls in the digital environment. The metaphysical question about whether distance education, copyright and privacy can mutually co-exist or whether one of them, like a Slobodan Milosevic in Serbia, will be forced out, is irrelevant. The real question is what you, and the DETC, and copyright and privacy interests, will do to ensure that the family stays intact. Let us all work together.

*  *  *
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This discussion is not intended to constitute legal advice regarding any client’s legal problems or specific questions and should not be relied upon as such.
ENDNOTES


2 Id. SIIA cites a study of the International Data Corp.


5 According to a report from the National Center for Education Statistics <<http://nces.ed.gov>>; see also, Smith, Kenneth D.; Eddy, John Paul; Richards, Thomas C.; and Dixon, Paul N., “Distance Education Copyright, Intellectual Property and Antitrust Concerns,” The American Journal of Distance Education 5 (2000).


7 See Report on Copyright and Digital Distance Education, U.S. Copyright Office (May 1999) [hereinafter “Register’s Report”].

8 Id. at 1.


12 Id. at 16-17. See also Remington, Michael J., “Website Legal Pages: Twelve Good Rules” <<http://www.dbr.com>>.


14 Goldstein, Paul, Copyright’s Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox 18 (1994).

15 See 17 U.S.C. § 302; a “pseudonymous work” is a work on the copies of which the author is identified under a fictitious name.


17 Id. at § 110.

18 Id. at § 107.


20 See Register’s Report at 91-93.

22 *Id.* at § 512.


24 Register’s Report at 92.
