Teaching via the Internet: A Brief Review of Copyright Law and Legal Issues

By Jiang (Joann) Lan and Dave Dagley

During the past two decades, computer and information technology have become a dominant world force, moving economies and creating knowledge at an unprecedented pace. Perhaps the most vigorous attention is being focused on the use of the Internet. In addition to delivering distance education, the Internet is increasingly being used to complement and supplement traditional mode of instruction. CASO’s (Cape Software) website currently lists 2635 courses from 82 accredited course providers that cover almost all major academic fields (CASO, 1998). Used appropriately, the Internet adds positive value to the learning process. Both professors and students increase productivity, acquire technical skills that will be essential in the 21st century, and develop cognitive ability through new stimuli and new perspectives. The Internet provides new ways of approaching educational activities, such as constructivism and cooperative learning. Based on synchronous and asynchronous communication, the Internet breaks the spacial and temporal constrains of the traditional mode of instruction. It enables learners to access instructional materials and participate in discussion or debate in a way and at times that are most respondent to students’ personal needs (learning styles and rhythms) and professional needs (available time, commitments) (Trentin, 1996).

As academic departments in universities prepare to offer courses by Internet, they will necessarily confront intellectual property issues, that is, ownership of faculty members’ fruits of labor. Some of the issues relate to infringements created in supplying and receiving information used in offering an Internet-based course. What are the copyright laws and guidelines which apply to academic courses or instructional elements delivered through the Internet? To what extent may government exert control, through copyright law, over communications in cyberspace? These are important questions impacting the ultimate structure and design of courses and programs offered through the Internet.

The legal literature currently contains numerous commentaries concerning the Internet and other computer-related legal issues. Some examples include: (a) personal jurisdiction, (b) speech regulation, (c) domestic regulation, (d) international regulation, (e) theft, (f) online liability, (g) copyright, (h) privacy, (i) pornography and obscenity, (j) the commercial code, and so forth. This paper focuses on potential legal problems related to only one of these areas of concern – copyright – that might arise from offering an academic course or delivering an instructional element of the course via the Internet. The purpose of this paper is to inform readers, through a brief review, of the copyright law and relevant issues related to teaching via the Internet.

COPYRIGHT LAW

Copyright law is rooted in Federal law, arising from legislative power granted to the Congress and by the Constitution:

The Congress shall have Power...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.

Basics of Copyright Law

Copyright represents a bundle of rights, a form of property (17 U.S.C. Sec 201). The Supreme Court has made clear that copyright is designed to do more than provide a private, monopolistic benefit for the holder of the copyright. Copyright achieves a public benefit by encouraging creative genius and turning over the products of genius to the public after the owner’s exclusive control has ceased (United States v. Paramount Pictures, 19xx). Creators of property subject to copyright are encouraged to produce by the copyright; the public benefits from the stimulation of creative energy. Copyright law, therefore, represents a carefully crafted balance between private rights and public benefit.
The Owner’s Right
The owner of a copyright has, subject to certain limitations, exclusive rights to do and to authorize any of the following (Emphasis added to highlight the respective right) (17 U.S.C. Sec. 106):

(a) to reproduce the copyrighted work in copies or phono records;

(b) to prepare derivative works based upon the copyrighted work;

(c) to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(d) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual work, to perform the copyrighted work publicly;

(e) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to display the copyrighted work publicly; and

(f) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

The Subject Matter of Copyright
The subject matter of copyright includes "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or devise." (17 U.S.C. Sec. 102[a]).

Works of authorship may include any of the following categories:
1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works.

Of the list of works of authorship protectable by copyright, computer programs are considered to be literary works (Whelan v. Jaslow, 1987). The statute defines “computer program” as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result (17 U.S.C. Sec. 101). The computer program used to carry the instructional content delivered via the Internet is copyrighted. The institution must purchase the program and sufficient number of licenses for the subscribed usage.

Copyright Requirements
It is a fundamental distinction that copyright does not protect an idea, but it does protect the expression of an idea (Baker v. Selden, 1879). For a work to be protected by copy-
the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or value of the copyrighted work.

A finding of fair use is a mixture of law and fact, and depends upon a case-by-case analysis of the four factors. Consequently, fair use is a fluid concept, and it would be somewhat difficult for an instructor to be assured that a particular use was fair.

**The Guidelines for Classroom Copying**

In 1976, an Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals was created between various interest groups (Brown, 1995). The agreement does not constitute statutory or regulatory language; it is merely an agreement made by parties that include some groups that are most likely to bring a copyright action. The agreement provides a “safe harbor” for classroom teachers on where fair use applies.

According to the agreement, teachers may make single copies for research purposes or for teaching or preparing to teach from any of the following resources: (a) a chapter from a book; (b) an article from a periodical or newspaper; (c) a short story; (d) short essay or poem; (e) whether or not it is from a collective work; or, a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper. The agreement also addresses the making of multiple copies for classroom use, by permitting up to one copy per pupil in a course, if the copying meets the tests for brevity, spontaneity, and cumulative effects provided in the agreement, and includes a notice of copyright on each copy. If a copy of a protected work is made by a teacher within the circumstances outlined in the guidelines, then the teacher’s use should be considered within the fair use doctrine.

**Two Opposing, Extreme Views**

In this brave new world of communication through information technology, new and varied terminology abound: (a) cyberspace; (b) Internet; (c) WWW; (d) information superhighway; and (e) National Information Infrastructure (NII). The terminology reflects movement from science fiction to technical reality, and from technical reality to economic and political potential. The terminology also identifies two extreme views about controls of any kind on the Internet. At one extreme, the view rejects government control of any kind; the other, at least as far as copyright is concerned, establishes a position where government stands ready to protect the property of copyright holders beyond the protection they receive under current regimes.

**“Cyberia”: No Control**

The term “cyberspace,” describing the virtual space existing between users, originates in science fiction. At the time that William Gibson (1984) coined the phrase, cyberspace was an extremely sparsely populated place. Certain technical skills were required to get to this new frontier. Like new emigrants to any frontier, this robust group established their own methods for maintaining peace and protecting individual rights. Like the “Code of the West” for mid-nineteenth century westerners, early denizens of cyberspace created their own “netiquette.” And like many of the original frontiersmen of the old west, citizens of cyberspace are slow to welcome the civilizing influences of expanding governmental structures. To underscore its identification with a new frontier, some technological extremists reject the label of “cyberspace” and identify this place as “Cyberia,” a place that rejects the jurisdictional control of any other polity. Illustrative of this viewpoint is the Declaration of Independence of Cyberspace (Barlow, 1996):

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Some have even gone so far as to say that, as a practical matter, copyright law will have no influence with respect to the Internet. A magazine article about the 1996 PC Forum features the views of Esther Dyson, an influential person in the computer world (Dreifus, 1996). Her argument is that increasing access to the Internet will drive down the costs of duplication and distribution, so that intellectual property will eventually have little value in the marketplace. What people create, particularly in written form, will merely be advertisements for something else the writer can do, such as speak or consult. If the writers are shy, she argues, then they won’t make any money. The work product of reclusive writers like J.D. Salinger and Harper Lee, apparently, would get lost in the babble.

**“Information Superhighway” and Other: Controlled Access**

At the other extreme are those who have the viewpoint that the Internet presents significant problems and opportunities, such that government intervention is essential. The term “information superhighway” reflects the movement of political leadership into the discussion and an attempt by government to exert some control. In an early speech, Vice President Al Gore mapped out the government’s interest in the Internet (Gore, 1991):

> Throughout American history, liberals and conservatives have argued about the proper role for government in stimulating economic progress. But they have generally agreed on one thing: the need for ample infrastructure. In times past, that meant building highways and railroad lines, water pipes and sewers, bridges and tunnels,
libraries and schools. It is now time to update our definition.

Just as the interstate highway system made sense for a postwar America with lots of new automobiles clogging crooked two-lane roads, a nationwide network of information superhighways now is needed to move the vast quantities of data that are creating a kind of information gridlock...In a sense, we have automated the process of gathering information without enhancing our ability to absorb its meaning.

Not only has the current administration named the information superhighway, it has also pulled the Internet into the orbit of governmental bureaucracy by giving it an acronym – the NII. The NII, the National Information Infrastructure, arises from an alliance of government and the private sector, to address both technological and policy concerns related to the Internet. Among those concerns are issues over intellectual property. A task force under this alliance produced a report that has been called the “White Paper” (Intellectual Property and the NII, 1995).

The White Paper
The White Paper would make three major changes in copyright law. First, calling up a document and reading it on one’s screen would be a violation of copyright law. Merely accessing a document that is resident on another computer requires copying the document in the user’s random access memory (RAM). Under the proposal, this would constitute a violation of the copyright owner’s right of reproduction (Lehman, 1996).

Second, the White Paper would provide an antitampering provision, which would prohibit tampering with copyright management information. (Copyright management information is described as terms and conditions for uses of the work that have been appended by the copyright owner). This provision anticipates that copyright owners could embed copyright protection devices into their files. The devices would disable the program if an attempt is made to copy it. The antitampering provision would provide civil damages and forfeiture of profits for tampering with the protection device, even if there is no intent of illegally copying the work itself.

A coalition of educational organizations have lobbied against this provision, arguing that it invites invasion of privacy of users, it creates a new “transmission right” that would make electronic communications “distributions” under the Copyright Act, and it erodes the traditional concepts and practices of “fair use” by failing to reaffirm their importance in a digital environment (Digital Future Coalition, 1995).

Finally, the White Paper would likely change fair use exemptions. Adoption of the White Paper into law would probably impact the balancing of the four factors for determining fair use. The easier access to materials provided by technology may enhance the educational use. But it may also magnify the impact the infringement has on the commercial value of the property in question. The application of fair use would also be modified by removing the exemption for face-to-face teaching activities existing under current law. The White Paper indicates that “users are not granted affirmative rights under the Copyright Act; rather, copyright owners’ rights are limited by exempting certain uses from liability” (17 U.S.C. Sec. 106a). Adoption of this provision into law would turn the information superhighway, in the words of one commentator, into a digital turnpike for educators: “Pick your destination and pay your toll” (Salomon, 1994a).

One other provision of the White Paper merits attention. Because of the fluidity of the information on the Internet, it will sometimes be difficult to find out who the copyright infringers are. The White Paper settles this problem by placing the burden on Internet service providers. According to the White Paper, online service providers are “in a better position to prevent or stop infringement than the copyright owner. Between these two relatively innocent parties, the best policy is to hold the service provider liable.” The White Paper concludes that “implementation of preventative measures, in compliance with the law, and development of technological mechanisms to guard against infringement must be encouraged” (Lehman, 1996).

It should be noted that the European Community has taken another approach to address this problem. Rather than provide penalties for infringement against service providers, the European Community’s version of the White Paper, now called a “Green Paper”, calls for imbedding tracking mechanisms into computer programs to trace the route of an infringing copy (The Technical Task Team Ministry of Posts, Telecommunications and Broadcasting, 1995). The legislation implementing minor portions of the White Paper, introduced in 1995, has still not passed either house of the Congress, at the time of the writing of this review. Consequently, further discussion focuses on application of case law under currently existing legislation.

Copyright Law Outside of United States
One of the impressive features of teaching via the Internet is the ability of university programs to reach out beyond national boundaries. Taking the UAB School of Education, where the authors of this article teach as an example, it currently offers degree programs in Israel, and has cultural exchange programs in the People’s Republic of China and Taiwan. Discussions are occurring which may renew a program previously offered in Mexico. Professors should be aware that US copyright law is not international law. However, most countries are signatories of two major international copyright conventions, the Universal Copyright Convention (UCC) and the Berne Convention. UCC countries provide some protection for authors who are a national or domiciliary of a member country or for work first published in a UCC country. Members of the Berne Convention treat US nationals like their own nationals for copyright purposes (Salomon, 1994b).

Professors should also be aware that, particularly in the non-Anglican European Community, copyright law in those countries respect what is known as “moral rights.” Moral rights include the rights of “integrity” and “attribu-
Copyright law maintains a balance between private rights and public benefit. It protects the owner’s right of “original works of authorship.” In education, this translates as intellectual property. Teaching via the Internet requires the use and development of computer programs, which are defined as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. Computer programs are considered literary works, one of the categories of “original works of authorship” qualified for copyright protection.

When planning courses or instruction via the Internet, the professor should first avoid loading substantial reading materials into the course Internet site. The decision to distribute instructional materials via the Internet should be based on the significant advantage it has over other means. In doing so, the professor should obtain permission for academic use from the owner of the copyrighted material, and stay within the intended use for which the permission was granted. If a commercial computer program is used to develop or deliver instruction, the institution should make sure that the computer program and sufficient numbers of licenses are purchased.

It is important to understand that copyright protects the expression of an idea, but not the idea it carries. Three requirements that qualify a work to be copyrighted are originality, creativity, and fixation. Originality and creativity insist that a work be an independent creation, while fixation refers to the permanent nature of the work. It is strongly recommended that the professor reconstitute the expression of the idea (paraphrase or diagram an idea originally in text format, etc.) that may be under copyright protection. The computer makes this task relatively easy.

A copyright infringement action must show (a) ownership of a valid copyright, and (b) copying by the defendant of the protected expression. Remedies for copyright infringement may range from simply abolishing the copied work to punitive rewards to the copyright holder. It might be helpful to know that in almost every situation involving an allegation of copyright infringement, the allegedly infringing educator or institution would raise the defense of fair use. Fair use is usually the first line of defense in a copyright action against educators.

Fair use doctrine applies to reproductions for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. Except for the act of news reporting, the other listed acts — criticism, comment, teaching, making multiple copies for classroom use, scholarship, and research identify much of a university professor’s job description. In determining the fair use, it is essential for educators to understand the four-factor test commonly used by the courts to analyze cases. The four-factors, the purpose and character of the use, the nature of copyrighted work, the amount and substantiality of the portion of the copyrighted work, and the effect of the use on the market value of the work, provide professors a means to self-analyze the instructional activities and materials they are planning to use in the Internet-based instruction.

Outside of the legal boundary, the Guidelines for Classroom Copying provides some parameters for educators who teach via the Internet to safeguard potential copyright problems. It should be stressed that the guidelines are considered a minimal safe harbor. Fair use may extend to situations that go beyond the guidelines.

Adding to the complexity and ambiguity regarding copyright law relating to teaching via the Internet are two extreme views about control of the Internet. At one extreme is the view that government should have no control of any kind. The other takes the position that government should stand ready to protect the property of copyright holders beyond the protections they receive under current regimes. While the first view is obviously cyberspace as anarchy, massive regulatory bureaucracy has often been the reaction to anarchy, which seems to be where the second view derives. Neither view seems desirable nor workable as we adjust our law and regulations to 21st century education models. Many professors are experimenting with new models of communication, new ways of storing, accessing and sharing information, new ways of managing professor/student relationships, and new ways of ordering behavior. In the absence of the physical and conceptual boundaries of the law on the Internet, the professor should apply human behavior, institutional ethics, and professionalism guided by explicit regulations (law), constrained by inexplicit rules (social norms), and self-confirmed by one’s conscience or religion, without the limitation of time and space.

It is clear that university professors, educational technologists, legal counsel, and university administrators need to be in communication with each other. While university professors busily convert the old way of doing things into a new format, educational technologists and legal counsel need to advise faculty of the dangers that exist in trying to
do things the old way in a new format. It is also likely that technology will cause modifications in the law equally as profound as those occurring in pedagogy.

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Jiang (Joann) Lan, School of Education, University of Alabama at Birmingham, 901 13th Street South, Need City, AL, Need Zip, USA jlan@uab.edu
Dave Dagley, School of Education, University of Alabama at Birmingham, 901 13th Street South, Need City, AL, Need Zip, USA ddagley@uab.edu