



## Copyright Issues for the Distance Learning Professor

DIANA D'AMICO JUETTNER<sup>1</sup> & ROY J. GIRASA<sup>2</sup>

<sup>1</sup>*Legal Studies Program, Division of Social and Behavioral Science, Mercy College, Dobbs Ferry, New York, U.S.A.;* <sup>2</sup>*Department of Legal Studies and Taxation, Lubin School of Business, Pace University, Pleasantville, New York, U.S.A.*

**Abstract.** The Internet has made the accessibility of knowledge both instantaneous and global. The professor who teaches online must be aware of the legal issues created by digital technology. The scope of the Fair Use Doctrine in the U.S. Copyright Law is under debate by educators and copyright owners. Educators advocate amending the scope of works available for distance learning, under the Fair Use principle, to include the same range of exclusions allowed in face to face classrooms such as: audiovisual works, movies and videos. While copyright owners advocate licensing of materials, educators feel that licensing procedures and costs need to be geared to the needs and ability to pay of the educational institution, otherwise their distance learning students will not have access to the same materials as those who sit in the classroom.

**Keywords:** copyright law, distance learning, education, digital technologies, computers, the Internet, distance learning educators, fair use, professors, digital environment, international initiatives and U.S. copyright law, digital images, use of copyrighted materials

New technologies for conveying data in digital form are expanding at a geometric pace at which Internet companies, educational institutions and the financial marketplace can barely stay current. Many colleges and universities throughout the world are taking advantage of these digital technologies by offering courses and degree programs in the distance learning environment. This environment has expanded the types of opportunities that are available to educational institutions. Some of these institutions have entered into joint ventures within and without national boundaries. For example, the Western Governors' University, a coalition of schools created within the United States, entered into a consortium with Britain's Open University to be known as the Governors Open University System. This consortium will combine different styles of education for students who wish to earn a degree.

The resources available on the Internet and the ability to copy the data provided, are both exciting and precarious for educators who wish to use the wealth of resources available on-line. The invention and use of digital technologies have created numerous copyright issues for the owners and users of these technologies.

Consider the plight of the professor who is asked to teach a course in the distance learning environment. In the traditional classroom environment, the professor puts materials on reserve in the library; provides students with copies of the materials; and shows legally acquired videotapes and/or parts of these videotapes as part of the instruction without violating copyright laws. Now that professor is asked to teach the course in the distance learning environment and would like to use the same materials in the digital environment. This professor cannot rely on the traditional copyright information that s(he) has relied upon in the past. What types of materials can be posted in the digital distance learning environment without violating the copyright laws? Is the Fair Use exception applicable in the distance learning environment?

There is little question that an instructor may show a legally acquired film in the traditional classroom to broaden the learning experience in a given area. The right to do so for the videoconferencing of a course may also be permissible if the course is not videotaped. The right to do so in the digital environment gives rise to legally impermissible results. Violations of copyright law may result in litigation and penalties for the professor and his/her teaching institution. Generally, there is no problem with the instructor placing syllabi, class notes, biography, chapter summaries and assignments (personally authored materials with only lawfully used copyrighted materials) on the Web. However, the use of films, copies of copyrighted articles, books or summaries thereof can lead to enormous potential legal difficulties.

In order to understand the issues at stake, the fundamental principles of U.S. copyright legislation and decisions relating thereto will be reviewed. Thereafter, the involvement of the U.S. in international copyright protection will be considered. The paper also reflects on the Report of the Register of Copyrights to the United States Senate Judiciary Committee and the Fair Use Guidelines promulgated by the Conference on Fair Use. Finally, a discussion of the impact of these laws and guidelines on the distance learning educator will be addressed.

## 1. U.S. copyright principles

### 1.1. *Copyright defined*

A copyright is a form of intellectual property rights wherein protection is given to:

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 device.<sup>1</sup>

Works of authorship include literary, musical and dramatic works, pantomimes, choreographic, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works.<sup>2</sup> Copyright protection is limited to the *expression* of an idea rather than to the idea, principle, process, system, concept or method of operation.<sup>3</sup> One can use the ideas and concepts extensively so long as s(he) does not copy the manner or method in which they have been stated. The work to be protected must be original, i.e., not a duplication from another prior work. It need not be useful [as for patents] nor must it display artistry or creativity. For example, a potential work can be a poorly crafted poem or written work.

### 1.2. *U.S. constitutional basis*

The U.S. Congress is given statutory authority to enact copyright legislation by the U.S. Constitution under Article I, Section 8 which provides, among other delegated powers, that:

The Congress shall have the power. . .

[8]. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

### 1.3. *Statutory rights of a copyright owner*

The owner of a copyright is given a number of exclusive rights with respect to the protected work. They are:

1. *Reproduction* in copies or phonorecords;
2. *Preparation* of derivative works;<sup>4</sup>
3. *Distribution* of copies or phonorecords to the public by sale, rental, lease, lending or other transfer of ownership;
4. *Performance*<sup>5</sup> publicly of the literary, musical, dramatic, choreographic work, by pantomime, in motion picture or other audiovisual works;
5. Display of the said copyrighted work in literary, musical, dramatic and choreographic works, pantomimes, pictorial, graphic or sculptural works and individual images of a motion picture or other audiovisual work; and
6. *Performance* publicly by means of a digital audio transmission of sound recordings.<sup>6</sup>

#### 1.4. *Moral rights*

Prior to 1990, the U.S. did not recognize that the author maintains moral rights in the copyrighted work that transcend the sale and transfer of the copyright. In countries that recognize moral rights in the author, the author can prevent intentional distortion, mutilation, destruction or modification prejudicial to his/her reputation. An illustration of this is the colorization of a film originally produced in black and white. The characteristics of moral rights can be summarized as follows:

*Attribution* – prevent the claim of authorship in a work or prevent use of one's name as an author of a work or visual art not created by him or her;

*Integrity* – the ability to prevent use of one's name on a work or visual art which was distorted, mutilated or otherwise modified which would injure the author's honor or reputation; and

*Prevention* – prevent the intentional distortion, mutilation, destruction or modification prejudicial to one's reputation.<sup>7</sup>

With the passage of the Visual Arts Rights Act of 1990,<sup>8</sup> the U.S. Copyright Act was amended so as to add a new visual art section [106A], which granted the author only of a work of visual art the above additional rights, heretofore recognized by most other countries.<sup>9</sup> The U.S. adoption of the Berne Convention in 1989 [discussed below], Article 6*bis* which accords moral rights to authors, does not bind the U.S. because it specifically excepted the Article 6*bis* clause when it adhered to the Convention. Whether the U.S. will accept more extensive moral rights protection in favor of protected authors awaits further U.S. legislative and judicial efforts. By adopting the WIPO Copyright Treaty and the Performances and Phonograms Treaty, however, the U.S. may have given recognition to moral rights.

The rights are subject to prior consent or other waiver by the author.<sup>10</sup> Also, there are exceptions for works which have become modified as a result of the passage of time, the inherent nature of the material, the result of conservation or due to the lighting or placement of a publicly presented visual art work.<sup>11</sup>

#### 1.5. *Duration*

For copyrighted works created on or after 1 January 1978, the protection is granted for a period of the life of the author plus 70 years.<sup>12</sup> For joint works, the period is the life of the last surviving author plus 70 years. For anonymous and pseudonymous works and works for hire, the duration is 95 years from year of first publication or 100 years from the year of creation whichever expires first.<sup>13</sup> Works created but not published or copyrighted before 1/1/78 have the same term as above but expire not sooner than 31/12/2002 and, if

published on or before 31/12/2002, are protected until 31/12/2027.<sup>14</sup> There is an exception in favor of libraries, archives and nonprofit educational institutions which have the right to treat a protected work in its last 20 years of protection as being in the public domain subject to the work not being used for commercial exploitation and to an author's objection to such usage.

### 1.6. Remedies

Anyone violating the rights of a copyright owner or who imparts copies or phonorecords in violation of the statute is an infringer and is subject to substantial criminal and civil penalties. The remedies available to the owner include the following:

1. Injunction, both temporary and final;<sup>15</sup>
2. Impounding copies or phonorecords made allegedly in violation of the copyright owner's rights including molds, plates, film negatives and so on. In addition, the Court in its final judgment or decree may order the destruction or other disposition of the contraband.<sup>16</sup>
3. The infringer may be liable for the copyright owner's actual damages; the profits of the infringer attributable to the infringement; or statutory damages of a minimum of \$200 to a maximum of \$25,000. If the Court finds the infringement to be willful, the Court may order statutory damages of up to \$100,000. If the Court finds the infringement to be innocent, it may lower statutory damages to no less than \$200; to zero sum if the infringer believed the use was a fair use and, also, if the infringer was an employee of an educational institution, library or from a public broadcasting entity.<sup>17</sup>
4. The Court may also allow, in its discretion, full costs and a reasonable attorney's fee.<sup>18</sup>
5. Criminal penalties: A person who willfully infringes a copyright for commercial advantage or private financial gain may be fined and/or imprisoned.<sup>19</sup> In addition, the Court may order forfeiture and destruction of the copies, devices and the like of the infringement.

The use of a fraudulent copyright notice subjects a person to a fine of up to \$2,500. A similar penalty may be imposed for fraudulent removal of a copyright notice and for false representation of a material fact in an application for copyright registration.<sup>20</sup>

Civil penalties comparable to the above may be imposed also against states, instrumentalities of states and state officials for infringement of copyright.<sup>21</sup> The Statute of Limitations for criminal and civil proceedings is three years from the commencement of the cause of action or claim.<sup>22</sup>

### 1.7. *Exceptions*

The Copyright Act lists a number of exceptions to the exclusive rights of copyright owners. They are:

1. Fair use;
2. Reproduction by libraries and archives;
3. Transfer by sale or otherwise to another person of a copy or phonorecord by the owner of the copy of phonorecord;
4. Certain performances and displays by instructors-pupils face-to-face teaching activities of a nonprofit educational teaching institution and related exemptions;
5. Certain secondary transmissions of a primary transmission not made by a cable system; and
6. Ephemeral recordings.<sup>23</sup>

### 1.8. *Other exceptions*

Names and titles of copyrighted works are not accorded protection.<sup>24</sup> U.S. Government works have no protection, although the government may receive and hold copyrights by way of bequest, assignment or other means.<sup>25</sup> Further exceptions include expired copyrights or works which are in the public domain, i.e., works which the author may not have sought protection and the allowable statutory protection period has expired.<sup>26</sup>

### 1.9. *Fair use*

The fair use exception as stated in the Section 107 of the U.S. Copyright Act, which will be the focus of the remainder of this paper, is as follows:

Notwithstanding the provisions of sections 106 [Exclusive rights in copyrighted works] and 106A [Rights of certain authors to attribution and integrity], use by reproduction in copies or phonorecords or by any other means specified by that section, *for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research* [emphasis supplied], is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>27</sup>

Fair use, like many expressions, is pregnant with diverse meanings. To what extent may one copy passages from a large work? What is the difference between commercial and noncommercial uses? Does use of a substantial portion of a work as parody allow it to be treated as fair use? Does it matter if the protected work is fictional or nonfictional?<sup>28</sup> It is clear that noncommercial use, especially by educational institutions, will be given much more latitude in making use of copyrighted materials than commercial use of the same materials.<sup>29</sup> The problem arises, however, with distance learning as it differs from the traditional mode of teaching, i.e., distance learning involves the digital delivery and transmission of information to remote locations *vis-à-vis* interactive communication within a classroom setting.<sup>30</sup>

The basic test used by the federal courts in interpreting the fair use doctrine contains the four elements set forth in Section 107 above. A leading case interpreting the above factors is *Basic Books, Inc. v. Kinko's Graphics Corp.* 758 F. Supp. 1522 (SDNY 1991), wherein Kinko's, which reproduced packets of copyrighted materials for professors and students, was held liable to the plaintiff publishing company because Kinko printed the materials for profit rather than doing so without such motive.

The four-fold test was used in *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) wherein a public school teacher copied 11 of 35 pages of another public school teacher's cake decorating booklet by making it a part of a 24 page learning activity package. In a lawsuit for infringement, the U.S. Court of Appeals addressed the issue of fair use. With respect to the first element [the purpose and character of the use], the Court held that the defendant used the materials for the same purpose as the plaintiff intended. The defendant not only failed to secure permission to copy the materials, but also failed to give attribution of the work to the plaintiff. As to the second factor [the nature of the copyrighted work], neither party was favored inasmuch as the material was informational and creative. The third factor [the degree to which the material was copied], the Court found that the defendant copied substantially all of the copyrighted work and thus clearly made the fair use defense inapplicable. The Court did not find the fourth factor [the impairment of marketability of the copied work] to have been established; nevertheless, the failure to do so would not permit the fair use defense under the circumstances.

In *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991), the widow of an author, whose life was the subject of a biography, sued to prevent the biographer from paraphrasing correspondence and journal entries, the ori-



ginals of which she refused permission to copy from. The Court of Appeals upheld the lower Court's dismissal of the lawsuit. In doing so, it addressed the four factors; as to the purpose and character of the use, the Court found that ideas or facts are not protected by the Copyright Act, only the medium of expression use citing *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Some of the paraphrases, however, were found to be potentially infringing inasmuch as they bore the mark of the plaintiff's husband's originality. Nevertheless, the use was for the purpose of criticism, scholarship and research and thus the defendant prevailed as to the first factor. The plaintiff prevailed on the second factor, due to the fact that the letters and journal entries had not been published. The third factor of the degree of material utilized was found to be in favor of the defendant because less than one percent of the materials were taken from the author's letters and entries. As to the fourth factor of the impairment of the marketability of the author's works, it appears that there was little market value of the materials at the time of the biographer's use. In fact, the biographer may have created a possible market for the plaintiff's protected materials by his publication.

*Playboy v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), involved a lawsuit against a bulletin board operator who copied photographs from plaintiff's magazine, loaded them onto his computer server and sought to have them made available by subscription. The Court obviously held in favor of the plaintiff inasmuch as the defendant's operation was commercial rather than educational in nature.

In *Bridge Publications v. Vein*, 827 F. Supp. 629 (S.D. Cal. 1993), the copying by an instructor of L. Ron Hubbard's tapes on Scientology in their entirety for a commercial course were found to be wrongful. In *Encyclopaedia Britannica Corporation v. Crooks*, (558 F. Supp. 1247 (W.D.N.Y. 1983), the Court held the defendant Board of Cooperative Educational Services [BOCES] liable for statutory damages of \$250 for each videotape created of the plaintiff's works inasmuch as guidelines created by the U.S. House of Representatives Subcommittee on Courts, Civil Liberties and the Administration of Justice for off-the air videotapes were violated.

Parody is apparently permissible. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, (1994), the U.S. Supreme Court held that a parody by 2 Live Crew of Roy Orbison's 'Oh, Pretty Woman' did not violate the author's rights. Much leeway is given when a protected work is used for purposes of criticism or, as in this case, to ridicule such effort.



## 2. International initiatives and U.S. copyright law amendments

### 2.1. *The Berne Convention for the Protection of Literary and Artistic Property*

The Berne Convention for the Protection of Literary and Artistic Property was established on 9 September 1886. It is the leading international copyright convention in effect to this day. The basic purpose for the Convention was to create an international union of countries which would protect the rights of authors in their literary and artistic works. The basic provisions include national treatment for works emanating from other member states, a minimum of fifty years of protection and the enumeration of rights which authors possess under the Convention.

The U.S. was not a party to the Convention for a century after its enactment, having preferred to engage in bilateral copyright agreements and essentially confined its international membership to the Universal Copyright Convention [U.C.C.] which had a lower standard of copyright protection and did not contain moral rights provisions among the enumerated rights as did the Berne Convention. Ultimately, the U.S. in 1988 became a member together with almost all of the industrial nations of the world, which membership now approaches 90 countries. The Berne Convention is administered by the United Nations Educational, Scientific and Cultural Organization [UNESCO].

One advantage of a multilateral relationship, as opposed to a bilateral relationship, is that all parties to the agreement are to accord all other parties the same treatment so that countries without obligations to other countries in the absence of the treaty must now adhere to such accord. Although Article 3(1) of the Berne Convention extended protection to non-Berne countries if the work was published simultaneously in the Berne [e.g., Canada] and non-Berne countries [e.g., U.S. prior to 1988], the administrative cost and procedures would adversely affect poorly financed authors. Other perceived advantages were assurance of U.S. participation in the development of procedures for contending with copyright problems raised by new technologies and strengthening U.S. credibility abroad in its endeavor to prevent copyright piracy.<sup>31</sup>

Computer programs are protected under the Berne Convention thereby according them the same copyright status as other works. In addition, compilations of data which are the result of 'intellectual creations' are also protected. The ideas themselves are not protected but protection is given to the unique compilation of such data.<sup>32</sup>

## 2.2. *Trade-Related Aspects of Intellectual Property Rights*

The U.S. was the proponent of the Uruguay Round of the General Agreement on Tariffs and Trade. The result was the signing on 15 April 1994 of the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.'<sup>33</sup> The Act included the establishment of the World Trade Organization and a series of Agreements in the Annexes therein. Of importance to our discussion is the 'Agreement on Trade-Related Aspects of Intellectual Property Rights' [TRIPS].

The key elements of the Agreement are:

*National treatment* – 'Each Member shall accord to the nationals of other Members treatment no less favorable than it accords to its own nationals. . .'<sup>34</sup>

*Most-Favored-Nation Treatment* – 'With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.'<sup>35</sup>

*Relationship to other conventions* – All member states are obliged to comply with the Berne Convention as modified in 1971 with the exception of moral rights.<sup>36</sup>

*Other provisions* – Computer programs were protected as literary works.<sup>37</sup> The term of protection was set at no less than life plus 50 years of publication or 50 years from the making of the publication.<sup>38</sup> Extensive protections were given to performers, producers of sound recordings and to broadcast organizations including the fixation of unfixed performances, authorization or prohibition of reproduction of performances and other related rights.<sup>39</sup>

## 2.3. *The World Intellectual Property Organization Treaty*

Two new treaties were formulated at a diplomatic conference of the World Intellectual Property Organization (WIPO) in December, 1996. They were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The treaties gave additional protection to authors by adding computer programs and data bases as 'literary works' under the Berne Convention. Exclusive rights of commercial rental are given to authors of computer programs, motion pictures [rental rights may be excepted as in the U.S.] and works within phonograms.<sup>40</sup> The Phonograms Treaty give recognition to moral rights to performers and allows them to control the fixation of their performance.

#### 2.4. *U.S. Digital Millennium Copyright Act*

The U.S. Digital Millennium Copyright Act (DMCA)<sup>41</sup> was signed into law by President William Clinton on 28 October 1998. The Act relates to the protection of on-line copyrighted materials.<sup>42</sup> The Act brings the U.S. in accord with international copyright treaties, particularly, under the World Intellectual Property Organization.<sup>43</sup> It provides protection to on-line service providers which unknowingly transmit copyrighted data, allows the copying of software during computer maintenance and facilitates Internet broadcasting.<sup>44</sup> It also protects nonprofit libraries, archives and nonprofit educational institutions and other users by providing that the fair use exception is not to be disturbed. In addition, nonprofit libraries, archives and nonprofit educational institutions may gain access to protected works in order to determine whether or not to acquire the works.<sup>45</sup> Section 512(e) provides greater certainty for educational institutions by providing protection from liability for infringement committed by faculty and students without their knowledge and approval.

The Act also charged the Register of Copyrights with the obligation to investigate, and report to Congress with recommendations for improving the application of the copyright law to distance learning using digital technologies. A summary of the Report is stated hereafter inasmuch as it appears to reflect immediate and near future U.S. policy and law.<sup>46</sup>

#### 2.5. *Report of the register of copyrights*

The Report begins with a discussion of the burgeoning field of distance education which is defined as 'a form of education in which students are separated from their instructor by time and/or space.'<sup>47</sup> The new technologies have created a virtual classroom, closely emulating the traditional teaching environment. In order to do so, library resources are used extensively for support of the course offering and allow access to supplementary course materials. The difficulty is that few licenses are ever requested for use of copyrighted materials for digital use. According to the Report, the problems inherent in seeking licenses include the difficulty in locating the copyright owner, the inability to receive a timely response and, if the owner is located, the prohibitive cost or other factors usually intertwined with licensing.

The technologies used by instructors vary widely. They include e-mail, use of audio or video files, links to websites, interactive CD-Roms and DVD-Roms, chat rooms and other methodologies. There are technological methods available for protection of copyrighted works. Educational institutions are employing security measures to limit outside access to such materials. They include password protection, encryption, firewalls, hardware connections, domain names and use of CD-Roms. Other protective measures include use

of low-resolution digital copies and streaming formats which prevent the making of copies.<sup>48</sup>

A problem arises when a digital network transmission is accomplished. The person receiving the transmission makes a temporary RAM copy in his/her computer. Such event causes a possible copyright breach in violating the right of reproduction, distribution and/or public performance or display. The views of educators and copyright owners conflict as to whether or not rights of the former or the latter should be expanded with respect to digital transmissions. Educators take the view that the current laws do not account for the radical changes brought about by the new technologies. They want a more open legal capability to engage in distance learning without facing the prospect of being sued for copyright infringement. For example, no one questions the right of an educator in a typical classroom setting to exhibit a properly purchased or leased film to students as part of a course. To do so in a distance learning setting may subject the same educator teaching the same course to possible legal sanctions. On the other hand, copyright owners fear that liberalizing the rules so as to permit such transmission may cause irretrievable losses in royalties. They want such transmissions to be subject to licensing fees.

The U.S. Copyright Office, through its representative Marybeth Peters, the Register of Copyrights, in accordance with the mandate in the Digital Millennium Copyright Act of 1998, studied the issue of the application of copyright law to distance learning education using digital technologies. The Report, given on 25 May 1999, was the result of a five-year study of the issue which included the identification of stakeholders, the holding of public hearings, research, solicitation of comments and consultations with experts. The Report is an in depth look at this important issue and reflects likely U.S. policy at the outset of the new millennium.

The recommendations by the Copyright Office to the U.S. Senate after considering the arguments and positions raised by the various stakeholders are as follows:

1. 'Clarify the meaning of transmission.'<sup>49</sup> In section 110(2) of the Copyright Act which states exemptions to infringements, the statute refers to transmission of a performance of a nondramatic literary or musical work. Such transmission is exempt from infringement if it is performed or displayed and is a regular part of instructional activities by either governmental or nonprofit educational institutions; and such performance or display is directly related or materially aids in the teaching of the course at hand; and the transmission is primarily for classroom, governmental or at a place accommodating persons with disabilities. The Copyright Office

wants the congress to add 'transmission by digital means' in addition to analog as permissible transmissions.

2. 'Expand coverage of rights to extent technologically necessary.'<sup>50</sup> The current exemption refers to 'performance or display' of the nondramatic literary or musical work. The Copyright Office recommends expanding the right beyond performance or display to include digital transmission over a computer network. The right of reproduction and/or distribution should be permitted only to the extent necessary to transmit the performance or display.
3. 'Emphasize concept of mediated instruction.'<sup>51</sup> The wording would clarify the exemption in Section 110(2)(A) which permits performance of the nondramatic literary or musical work, if ... [it] is a regular part of the systematic instructional activities of a ... nonprofit educational institution.' The Copyright Office would also permit 'mediated instruction' which would be analogous to classroom instruction but is accomplished at the direction of the instructor within the course setting.
4. 'Eliminate requirement of physical classroom.'<sup>52</sup> Section 110(2)(c)(i) of the Copyright Act refers to 'reception in classrooms or similar places normally devoted to instruction. . . .' The change would permit digital distance learning without the need for such facilities. On the other hand, the Report makes clear that such changes should not be so broad as to permit the general public to view the performances or displays but rather should be directed solely to participants in the course of instruction.
5. 'Add new safeguards to counteract new risks.'<sup>53</sup> To protect the copyright owner, the Report recommends safeguards which include the following; (1) copies of the works are to be retained only for the period necessary to accomplish the instructional activity; (2) the educational institution or governmental agency seeking to invoke the exemption must institute policies to instruct and promote compliance with the copyright protections in favor of the owners thereof; and (3) the institutions involved must take reasonable measures to prevent unauthorized uses of the transmission.
6. 'Maintain existing standards of eligibility.'<sup>54</sup> The educational institution which is permitted to invoke the above exemptions must be a nonprofit institution. The Report indicated the perceived blurring of lines between profit and nonprofit educational institutions but does not advocate any changes to the statute at the present time.
7. 'Expand categories of works covered.'<sup>55</sup> The statute refers only to 'nondramatic literary or musical work.' The Report, after referring to the possible abuses against copyright owners, notes that educators wish to use multimedia works including audiovisual works which may not be covered

by the exemption. The Report offers a compromise by recommending the addition of other works not presently covered by the statute but not in their entirety. Only 'reasonable and limited portions' of the added works would be permitted and only if they are the subject of study and not for entertainment purposes.

8. 'Add new ephemeral recording exemption.' The addition would permit an educator to upload protected works onto a server for later transmission to enrolled students. The permission would be subject to safeguards of no further reproduction, retention of the copy and use solely by the entity, be limited in time and used solely by students for educational purpose within the prescribed course of studies.
9. Other recommendations. The fair use exception should be made clear to include distance learning; that the guidelines are 'a safe harbor, rather than a ceiling on what is permitted'; efforts be made to enact guidelines for present and future developments; put in place a methodology of resolving possible copyright difficulties where the owner thereof cannot be found; and revisiting the issues presented in the near future.

The implementation of any or all of these recommendations is currently pending before the appropriate subcommittees of the Senate and House Judiciary Committees. It remains to be seen if the subcommittees of either body will sponsor legislation supporting any of the recommendations made by the Register and subsequently recommend adoption by the 106th Congress.

### **3. Fair use guidelines for distance learning: President Clinton's initiative**

The need for a re-thinking of the concept of fair use and other intellectual property issues became evident in the highest reaches of government. Accordingly, President Clinton convened an Information Infrastructure Task Force in 1993, together with the U.S. Advisory Council on the National Information Infrastructure within the Department of Commerce, to investigate and report on a proposed plan for the development of the said infrastructure.<sup>56</sup> The Task Force met, solicited written and public comments and released a preliminary draft report on 7 July 1994. A Conference on Fair Use was thereafter convened to review fair use issues and to make recommendations concerning guidelines for fair uses. About 100 organizations representing libraries, publishers, museums, colleges and universities, musical interests, copyright groups, the entire spectrum of the media and many other groups, participated over the next three years in the discussions, formulating suggestions and otherwise assisting in preparing the guidelines to be discussed below.<sup>57</sup>



As different issues arose concerning digital issues, distance learning, electronic multimedia, electronic reserve systems and other areas of technological developments, each of the areas was investigated and reported on by different working groups. The Distance Learning Group convened in order 'to provide guidance on the application of the performance and display of copyrighted works in . . . distance learning environments. . . .'<sup>58</sup>

The significance of the guidelines is that they will avoid potential litigation with the participating organizations and may operate as persuasive evidence in a copyright infringement action arising out of the areas covered therein. It would also appear that the more one breaches the guidelines the more potential liability that person will face. Thus, we will set forth the provisions therein in considerable detail. The guidelines on fair use concern only copyrights. The guidance set forth are for use by noncommercial entities, specifically 'educational institutions, educators, scholars and students' using distance learning without first attempting to receive permission from the multitude of possible copyright owners.<sup>59</sup> The guidelines address in particular the provisions of Section 110 of the Copyright Act. Section 110 makes an exception to Section 106's grant of exclusive rights in copyrighted works. It declares that it is not an infringement to:

1. perform or display a work by an instructor or pupil in *face-to-face* teaching activities in a classroom or similar place in a nonprofit educational institution unless an unlawful copy of the work is used in and the person using it knew or had reason to know of the unlawful use;
2. perform or display a nondramatic literary or musical work if it is part of the regular, systematic instructional activity, is directly related or materially assists in the teaching of it; and it is transmitted primarily for reception in classrooms or similar place, or to disabled persons who cannot attend classrooms or is received by employees or officers of government bodies for governmental purposes;
3. perform a nondramatic literary or musical work or a dramatic-musical religious work for religious services at a religious place;
4. perform a nondramatic literary or musical work for no fee or other payment or advantage to anyone involved and no fee for admission is charged and the proceeds after costs are used exclusively for religious, educational or charitable purposes unless the copyright owner objects in writing is served at least 7 days before the performance and the notice complies with regulatory requirements; if performed for a nonprofit veterans' or fraternal organization not opened to the public, a fee can be charged provided it accrues entirely for charitable purposes.
5. perform for noncommercial use for one occasion to the blind or other handicapped people; and



6. perform for sales promotion purposes to the public for purposes of selling copies of the work and the performance takes place solely within the promotion area without admission charge.

Fair use in distance learning concerns the first two categories.<sup>60</sup> The distance learning guidelines concern lawfully acquired copyrighted works used in live interactive distance learning classes and pre-recorded instruction for use by students in a later transmission not covered by Section 110(2). The guidelines provide:

1. The eligible institutions are those engaged in nonprofit education and their focus is to engage in nonprofit research and educational instruction;
2. Students must be officially enrolled for the distance learning course with an eligible educational institution or are government employees taking the course as part of governmental purposes.

The performed works must be a part of the course and directly related to the subject matter and not for entertainment purposes. The transmission must be over a secure system requiring a means of identification such as a password PIN number and so on. The transmission must be received in a classroom or place devoted to instructional purposes at an educational institution. The use of the copyrighted work must be for one time only or else permission would have to be obtained. The receiving institutional may copy or record the transmission and retain it for up to 15 consecutive days for student viewing in a controlled environment such as a library, classroom or media center. The institution must prevent copying of the work by students or other persons and must delete the copyrighted portion of the transmission unless permission is obtained from the copyright owner.

The transmitting institution may make up to 30 copies of the copyrighted work but cannot make further copies and must destroy all copies within 7 years except that one copy may be kept for archival purposes.<sup>61</sup> If the copyrighted multimedia work was received by means of a license, then the provisions of the license agreement will apply. Permission will be required in all situations where there is commercial use of the work including when the nonprofit educational institution is using the work for courses for a for-profit corporation for a fee; for further dissemination of the copyrighted work for instructional purposes; where nonemployees may take a course within an agency or institution offering the program; and any use beyond the 15 day period.<sup>62</sup>

### 3.1. *Guidelines for digital images*

The guidelines in this section concern the conversion of visual images into digital images. 'A digital image is a visual work stored in binary code (bits and bytes).'<sup>63</sup> Included in the definition of such images are 'bitmapped images' which are a series of bits and bytes representing a specific pixel or part of an image and 'vector graphics' which are encoded equations or algorithms representing lines and curves. An 'analog image collection' is a collection of analog visual images in the form of slides, photographs and other visual media. An educational institution<sup>64</sup> is permitted lawfully to digitize analog visual images for educational purposes provided such images are not available for purchase or license at a fair price. The institution may also create thumbnail images for placement in a visual catalog for use by the institution. It may display and give access to the images provided controls are placed to protect copyright owners and give notice that the images may not be downloaded or copied in any manner.<sup>65</sup> The visual on-line catalog may be placed on the institution's secure electronic network for access by educators, scholars and students connected with the institution.<sup>66</sup> The educational institution may display such images on the secure electronic network for classroom use or for after class review provided they are transmitted only to enrolled students of the course and said students have exclusive access. Access beyond the secure electronic network is not permitted.<sup>67</sup>

The time limitation for digitized images is one academic term unless the holder of the right to the copyright is unknown, in which case the limit is three years.<sup>68</sup> The educator may use the images for face-to-face instruction or over a secure electronic network as well as for peer conferences [seminars, workshops and related conferences]. Students may use the digital images for term papers, for critique and for use in portfolios for graduate school or for employment applications.<sup>69</sup>

Limitations include the need for reasonable inquiry by educational institutions to ascertain the rightful owner of the images if unknown, making appropriate attribute and acknowledgment for credit purposes, ascertain whether the images are subject to licensing and maintaining the integrity of the images [except that they may be altered for scholarship purposes with appropriate notations].<sup>70</sup>

### 3.2. *Educational multimedia guidelines*

The permitted uses of educational multimedia projects, as set forth by the President's task force, are as follows: Students are permitted to incorporate portions of copyrighted works when preparing multimedia projects for a specific course and may further use the projects for personal uses as for

job and graduate schools interviews.<sup>71</sup> Educators may also incorporate parts of copyrighted works in educational multimedia projects when used for purposes of teaching in a 'curriculum-based instructional activities at educational institutions.' They may also perform and display such projects as part of a face-to-face curriculum-based instruction, or when the projects are assigned to students for self-study or for remote instruction under the same conditions provided it is done over a secure electronic network wherein access is secure and copies are prevented. If access cannot be made secure by the educational institution, then the use of the copyrighted portion may be made for a 15 day period after which one copy may be kept in a learning resource center, library or similar facility with the proviso that students may not make copies of the work. Educators may also use the multimedia projects for presentations to other professors as in workshops and the like as well as for tenure review or job interviews.<sup>72</sup>

There are limitations in the time, portion, copying and distribution of the copyrighted works. Instructors may use their multimedia projects for instructional use for up to two years after first instructional use after which time permission from the copyright owner will be required. Portion limitations: for motion media up to 10% or three minutes whichever is less; for text material up to 10% or 1000 words whichever is less as well as an entire poem of 250 words or less but no more than three poems by one author or five poems from different authors from an anthology; for longer poems, 250 words but no more than three excerpts or five excerpts from an anthology; for music, lyrics and music video – up to 10% but no more than 30 seconds from an individual work; for illustrations and photographs – a photograph or illustration may be used but no more than five images by the artist and not more than 10% or 15 images whichever is less from a published collective work; and numerical data sets – up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table. Up to two copies may be made of the educator's educational multimedia project, one of which may be placed on reserve as indicated above.<sup>73</sup>

Permission from the owner of the copyright is necessary when the use of the projects is for commercial reproduction and distribution or exceeds the above limitations or the use of the projects is for other than the stated uses.<sup>74</sup> Other limitations and requirements include the attribution and acknowledgment of the copyright owner/author; the inclusion of a notice that certain materials in the multimedia project were prepared in accordance with these guidelines; the maintenance of integrity of the copyrighted works or when altered, that such alterations be in accordance with specific objectives; and that the copying of the works are not permitted.<sup>75</sup>

#### 4. Analysis and conclusion

While distance learning will be a widely used style of education that is significant in the future of education, some aspects of the delivery of data by faculty and students can and do raise serious copyright questions. With the significant changes that occur every day in technology, the potential for more diverse copyright questions can be expected with the introduction of new technology.

The laws presently addressing the main issues herein are not adequate because they are creating enormous controversy among the owners of the copyrighted works and the users of the Internet. Since the technology can be introduced at a far greater rate than remedies can be promulgated, it is incumbent upon the educator to be constantly wary of copyright violations and judicious in the utilization of copyrighted materials using uncharted technologies.

The President's panel on Fair Use appears to have taken significant first steps to address the issues raised by the new technologies. These are but first steps because the technology is advancing so quickly that when action is taken, the changes will have created a need for further regulation.

The Register of Copyrights stated in her report to Congress that the Fair Use Doctrine is technology-neutral and can be used in the digital environment. She recommended that if legislation is proposed some examples of the application of Fair Use should be included in the report that accompanies the legislation to provide some guidance for educators. She points out that fair use is a 'safe harbor' and is not a ceiling for what is permitted by the user.<sup>76</sup>

While both sides agree that the present doctrine of fair use does cover distance learning, educators advocate amending the scope of works available for distance learning to the same scope of exclusions as allowed in face to face classes [Section 110(1)] which would include audiovisual works [movies and videos]. Copyright owners argue against broadening the exclusion as this would decrease their commercial opportunities in this new growth market. They point out that distance learning is flourishing under the existing law. Copyright owners also assert that digitizing copyrighted works for distance learning can provide the opportunity for a student to transfer numerous copies by means of the Web. Digitizing can also lead to mutilation, a violation of moral rights. Downloading of movies and movie clips could result in a significant revenue loss.<sup>77</sup>

Because of the numerous sources of copyrighted materials that can be used in various types of courses, it is not practical for both the owner and the user of the copyright to provide and obtain the required permission. While copyright owners advocate licensing of materials, present licensing procedures are cumbersome and are not an efficient method of handling the problem.

Educators indicate that the added costs of licensing over and above expensive equipment costs could make distance learning uneconomical, particularly for not-for-profit institutions. Copyright owners urge that this licensing cost is just another overhead cost such as books. If licensing is to play a role in the use of copyrighted materials in distance learning, as educators feel it should, the licensing procedures, costs and volume of material licensed need to be geared to the broad needs and ability to pay of the educational institution.<sup>78</sup> As an option, educational institutions could obtain annual licenses at a reasonable royalty to cover the use of copyrighted materials using formats such as the presently existing Copyright Clearance Center.

The best solution may not be government intervention, but it seems to be the only practical solution to help educators provide the same quality of education to their distance learning students. Unless we eliminate copyright protection altogether, breach of copyrighted material will continue almost unabated or materials will not be available for use by educators and librarians who work at not for profit institutions.

## Notes

<sup>1</sup> 17 U.S.C. §102(a).

<sup>2</sup> *Id.*

<sup>3</sup> 17 U.S.C. §102(b). In *Feist Publications Inc. v. Rural Tel. Ser. Co.*, 499 U.S. 340, 349-50 (1991), the U.S. Supreme Court stated that the objective sought by the Copyright laws according to the Constitution [Article I, Section 8] is to 'promote the Progress of Science and Useful Arts...' rather than to reward the labor of authors.

<sup>4</sup> A 'derivative work' is one based on a pre-existing work and includes a sound recording, motion picture, musical arrangement, translation, art reproduction, abridgment and the like. 17 U.S.C. section 101.

<sup>5</sup> *Id.* 'Perform' means to recite, play, dance, act, show images or make sounds.

<sup>6</sup> 17 U.S.C. §106.

<sup>7</sup> 17 U.S.C. §106A.

<sup>8</sup> Pub. L. 101-650, 104 Stat. 5128.

<sup>9</sup> The Visual Rights Act of 1990, Pub. L. 101-650, became effective on 1 June 1991. It extended the protection to copyrighted works prior to said date, which the author had not transferred and to works created on or after 1 June 1991. Moral rights did not extend to works which had been destroyed or mutilated before the said date [see footnote to section 106A of the Copyright Act].

<sup>10</sup> The right is subject to 17 U.S.C. §113(d), §106 and §107.

<sup>11</sup> 17 U.S.C. §106A(c). A 'work of visual art' is a single painting, drawing, print, a sculpture or still photographic image for exhibition purposes and up to 200 signed and consecutively numbered such works. It does not include works for hire, U.S. Government works, poster, map, globe, chart, diagram, model, magazine, newspaper and the like. [These are covered by other copyright provisions.]

<sup>12</sup> The period of life plus 50 years was extended as indicated by virtue of the signing into law of an amendment to the Copyright Act by President William Clinton on 27 October 1998

of 'An Act to amend the provisions of title 17, Unites States Code, with respect to the duration of copyrights and for other purposes.'

<sup>13</sup> 17 U.S.C. §302(a)(b)(c).

<sup>14</sup> 17 U.S.C. §303.

<sup>15</sup> 17 U.S.C. §502.

<sup>16</sup> 17 U.S.C. §503.

<sup>17</sup> 17 U.S.C. §504.

<sup>18</sup> 17 U.S.C. §505.

<sup>19</sup> 18 U.S.C. §2319.

<sup>20</sup> 17 U.S.C. §506.

<sup>21</sup> 17 U.S.C. §511.

<sup>22</sup> 17 U.S.C. §507.

<sup>23</sup> 17 U.S.C. §107–112.

<sup>24</sup> 37 C.F.R. 202.1(a) (1994).

<sup>25</sup> See 17 U.S.C. §105. Another exception may be found in 15 U.S.C. §290(e) which permits the Secretary of Commerce to seek copyright protection to certain standard reference data prepared by the Secretary or his/her department representatives.

<sup>26</sup> 17 U.S.C. §302(a).

<sup>27</sup> 17 U.S.C. §107.

<sup>28</sup> For a comprehensive examination of the fair use issue, see Needham J. Boddie, II, Thomas C. McThenis, Jr., Fred B. Amos II, and Douglas W. Kim, 'A Review of Copyright and the Internet', 20 Campbell L. Rev. 193, pp. 193–272, Spring, 1998.

<sup>29</sup> See, *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) and *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

<sup>30</sup> See, Robert N. Diotalevi, 'Copyright Law: A Guide for the New Millennium,' *Syllabus* (April, 1999, pp. 48–50).

<sup>31</sup> See, 'The Senate Report on the Berne Convention Implementation Act of 1988,' Senate Report, 20 May 1988, 100th congress, 2d Session, Report 100-352.

<sup>32</sup> Article 10(1)(2).

<sup>33</sup> At Marrakesh, Morocco. 110 nations signed the Agreement plus the European Communities.

<sup>34</sup> Art. 3(1).

<sup>35</sup> Article 4.

<sup>36</sup> Article 9(1).

<sup>37</sup> Article 10(1).

<sup>38</sup> Article 12.

<sup>39</sup> Article 14.

<sup>40</sup> Article 7 of the Treaty. See discussion by Steven R. Englund and Roberta L. Horton, 'Bills to Implement WIPO Treaties Ignite Debate,' *National Law Journal*, 20 October 1997.

<sup>41</sup> The official name of the statute signed by President William Clinton on 28 May 1998 is 'An Act to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.'

<sup>42</sup> For a summary discussion of the new enactment, see Robert N. Diotalevi, 'Copyrighting Cyberspace: Unweaving a Tangled Web,' *Syllabus*, January 1999, pp. 44–46.

<sup>43</sup> Title I-WIPO Treaties Implementation.

- <sup>44</sup> §1202(e).
- <sup>45</sup> §103(c)(d) of the Title I.
- <sup>46</sup> 106th Congress, U.S. Senate, Committee of the Judiciary. The Report is reflected in the 'Statement of Marybeth Peters, Register of Copyrights, before the Committee on 25 May 1999, <http://lcweb.loc.gov/cpy/pub/regstat52599.html>.
- <sup>47</sup> *Id.* at p. 1.
- <sup>48</sup> *Id.* at pp. 3–4.
- <sup>49</sup> *Id.* at p. 10.
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.*
- <sup>52</sup> *Id.*
- <sup>53</sup> *Id.* at p. 11.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Id.*
- <sup>56</sup> Exec. Order No. 12864, 3 C.F.R. 634 (1993), cited in The Conference on Fair Use, *Report to the Commissioner on the Conclusion of the First Phase of the Conference on Fair Use*, September 1997, p. 1. The Guidelines are found in the Report.
- <sup>57</sup> *Id.* A complete list of the participating organizations can be found in pp. 23–24.
- <sup>58</sup> *Id.* at p. 12.
- <sup>59</sup> *Id.* at p. 49.
- <sup>60</sup> See 17 U.S.C. §110(1)(2).
- <sup>61</sup> *Supra* at note 56, pp. 51–53. The Copyright section allowing 30 copies is 17 U.S.C. §112(b).
- <sup>62</sup> *Id.* at p. 53.
- <sup>63</sup> *Id.* at p. 40.
- <sup>64</sup> *Id.* at p. 39. Defined as 'nonprofit organizations whose primary purpose is supporting the nonprofit instructional, research, and scholarly activities of educators, scholars, and students. . . .'
- <sup>65</sup> *Id.*, §2.1–2.3 at pp. 40–41.
- <sup>66</sup> *Id.*, §2.3.1. 'Educators' are defined as 'faculty, teachers, instructors, curators, librarians, archivists, or professional staff who engage in instructional, research, or scholarly activities for educational purposes. . . .' at p. 40.
- <sup>67</sup> *Id.*, §2.3.2–2.3.3 at p. 41.
- <sup>68</sup> *Id.*, §2.4.1–2.4.2 at p. 42.
- <sup>69</sup> *Id.*, §3.2 and 3.4 at pp. 42–43.
- <sup>70</sup> *Id.*, §5.1–5.7 at pp. 43–44.
- <sup>71</sup> *Id.* at §2.1 and §3.1 of the Guidelines.
- <sup>72</sup> *Id.* at §3.2–3.4 of the Guidelines.
- <sup>73</sup> *Id.* at §4.1–4.3 of the Guidelines.
- <sup>74</sup> *Id.* at §5.1–5.3 of the Guidelines.
- <sup>75</sup> *Id.* at §6.2–6.6 of the Guidelines.
- <sup>76</sup> *Supra* at note 46, p. 13.
- <sup>77</sup> *Id.* at p. 7.
- <sup>78</sup> *Id.*