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## ABSTRACT

This paper examines the issues associated with educational policy and distance education. New forms of distance education portend a change for student populations, while encouraging faculty to develop new modalities of teaching and administrators to provide a new infrastructure of support. As a result, the advent of distance education is forcing many institutions to review and amend their existing policies and procedures. The areas covered in this paper include: (1) intellectual property policies; (2) ownership of distance education courses; (3) faculty issues; (4) student issues; (5) limiting liability; (6) commercialization; and (7) teaching beyond state and international borders. The paper argues that intellectual property policy is a core issue. An online learning policy will implicate patent, copyright, and software policies, and for some institutions, their trademark, multimedia, and videotaping policies. The paper delineates six areas that should be addressed when revisiting intellectual property issues: (1) clarification of what constitutes intellectual property; (2) definition of inventor and author rights; (3) identification of when and how the institution can use intellectual property; (4) clarification of how faculty will be compensated for the development and preparation of online classes; (5) identification of who will administer the institutions' policies; and (6) clarification of when the inventor or author can use the institution's trademarks. (NB)

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# Developing a Distance Education Policy for 21st Century Learning

March 2000

Distance education, an idea as old as the pony express correspondence courses, is transforming education today because of the immediacy with which it can occur and the types of interactions now possible over such great distances. What is even more interesting or distressing, depending on one's views, is that the new distance education force transforming higher education may not be controlled by the traditional structures or providers of education services or by traditional academic policies. Not only do the new forms of distance education portend a change for student populations, but also they will force faculty to develop new modalities of teaching and administrators to provide a new infrastructure for support. As a result, the advent of distance education is forcing many institutions to review and amend many of their existing policies and procedures. The following is a primer on the issues an institution will confront as it plans to integrate, implement, and harmonize distance education into its existing policies.

A core policy that must be examined is the institution's intellectual property policy. Thereafter, principal issues to be addressed include: intellectual property policies with respect to ownership of a distance education course; institutional and faculty rights and responsibilities after a course is created; faculty compensation, teaching-load and acceptance; student access and privacy; potential liabilities associated with distance education courses (including copyright infringement liability); and accreditation and approvals beyond state and national borders.

## I. Intellectual Property Policies Implicated

One of the first steps an institution should take when developing a distance education policy is to review the institution's existing intellectual property policies and determine whether they need revision in light of this relatively new learning modality. An on-

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line learning policy will implicate patent, copyright and software policies, and for some institutions, their trademark, multimedia and videotaping policies. The examination of these intellectual property policies often will force the institution to consider the relative balances between its various missions, including, for example, research, dissemination of knowledge, commercialization of technology and public service.

Most institutions will find that a revision of their intellectual policies will be necessary because distance education intellectual property issues cannot be neatly governed by any one of those single policies. Faculty often argue that material prepared for distance education courses should be governed by an institution's copyright policies which typically vest ownership and other rights in faculty, while others focus on the costs to the institution and argue that the institution's patent policy should govern because of the significant institutional resources and support that typically are invested in an on-line course. Similarly, some institutions have attempted to apply existing courseware policies to distance education issues. Computer science and telecommunications departments believe that to the extent faculty works rely on and incorporate the resources of those departments, they should share in whatever benefits flow from the creation and production of such courses.




The revisiting of the institution's intellectual property policies, on the other hand, creates an opportunity for the institution to:

1. Clarify what is intellectual property and the circumstances under which the institution will assume the costs of protecting intellectual property. A patent protects ideas, but patent registration is expensive, particularly if the patent is prosecuted internationally, and a patent generally lasts 20 years. Some forms of software may be protected by patents. In contrast, copyright protects the particular expression of facts and ideas, and so it is more limited in scope than a patent, is relatively inexpensive to obtain, and lasts far longer than a patent. Software may also be protected by a copyright, albeit more narrowly than a patent. Also, consider that the institution's technology transfer office may usefully negotiate licenses, royalty agreements, and marketing agreements.

2. Define inventor and author rights including rights of revision and adaptation, reproduction, display and the most important, ownership, which is discussed more fully below. For example, the institution must address whether faculty will be able to prepare course work for unaffiliated distance education providers and whether faculty will be able to use copyrighted work after the faculty member leaves the institution, or whether the faculty member can prevent the use of the work because it is outmoded or dated. The answers to these types of questions likely will implicate the institution's conflict of interest policies.

3. Identify when and how the institution can use intellectual property generated by faculty whether it is via ownership or licenses, exclusive, non-exclusive, for internal and non-commercial purposes only and what temporal or employment-related limitations exist.

4. Clarify how faculty will be compensated for the development and preparation of distance learning courses and how the parties will share in any royalties generated by the courses. Clarify how the authorship of distance education courses will affect promotion and tenure.

 5. Identify who will administer the institution's intellectual property policies, what is the default mechanism for circumstances not specifically enumerated in the institution's intellectual property policies, and what will be the initial dispute resolution mechanism.

6. Clarify when the inventor or author can use the institution's trademarks, e.g., name and logos, when commercializing a work.

## **II. Ownership of Distance Education Courses**

### **A. Basis for Ownership**

As noted above, because so many rights devolve therefrom, a critical issue when formulating a distance learning policy is who will own the on-line course. One of the first exercises in determining who will own an electronic course is to consider the various legal bases for ownership: (1) the employee-employer relationship, which may be subject to the terms of a collective bargaining agreement and/or state law for public institutions; (2) faculty policies and handbooks; (3) state laws relating to public institutions; (4) research contract requirements, whether from federal grants and contracts or industry sponsorship agreements; (5) federal procurement requirements; and (6) common law, traditional or customary rights, such as academic freedom.

### **B. Models of Ownership**

Under existing copyright and patent policies that are prevalent on campuses today, institutions vest ownership of the copyright in traditional academic works in the faculty member and vest ownership of patents in the institution. Thus, many institutions that have attempted to fold the ownership issues related to distance education courses into existing policies have arrived at an ownership scheme similar to the following, which uses copyright as the basis for ownership:

1. The copyright for an electronic course that a faculty member created on his or her own initiative in the course of fulfilling teaching duties, will be owned by the faculty member.
2. The copyright for works created under a contract with the institution, or works created as a work for hire, will be owned by the institution. Thus, the copyright for works created by non-faculty employees within the scope of their employment, or works created by a faculty member who was required to create such courses as a condition of his or her employment, will be owned by the institution. Whether a course was assigned or was the idea of a faculty member is a touchstone for many institution's ownership issues. As discussed more fully below, several institutions are incorporating requirements for the development of on-line courses in their new faculty contracts.
3. The copyright for works created by faculty and a party whose contribution would be a work for hire will be jointly owned by the institution and the faculty member.



Some institutions have evaluated ownership of electronic courses as being on a continuum depending on the investment of the institution. If substantial institutional resources were used to develop or produce an electronic course, even one created on a faculty member's initiative, the institution will either jointly or entirely own the copyright for the course. A trend is to use the work-for-hire model when substantial institutional resources are used. A study done by Oklahoma State University Institute for Telecommunications in 1996 showed that most on-line courses were treated as works for hire by institutions and thereby reflect institutions' ownership based on contractual obligations or the use of substantial resources. The key issue to be addressed in such policies is establishing a definition of "substantial."

Other institutions have a model that vests copyright in the institution for a finite period of time, which may or may not be linked to the faculty member's employment institution, and provides that after that period, ownership will revert to the faculty member.

Some institutions have adopted a model used by academic publishers under which ownership is transferred to them, but the faculty member is given a non-exclusive, loyalty-free license to use the work in his or her own classes or at a new institution employing the faculty member. Alternatively, if the faculty member owns the copyright and the faculty member leaves, the institution may be granted a non-exclusive, royalty-free license to continue to use the work for its instructional purposes, but may not otherwise commercialize the work.

The challenge is to devise a policy that encourages development of on-line courses. At one university, the faculty refused to participate in on-line courses if they had to give up ownership.

### C. The AAUP and Ownership

The American Association of University Professors' ("AAUP") June, 1999 policy statement reaffirms that faculty "ordinarily" should retain ownership to distance education courses they create, although it recognizes that technology has created some gray areas, such as when "specialized" institutional services or resources are used. Nevertheless, AAUP agrees that a college or university may retain ownership in distance education materials created by professors if such materials are work for hire, a joint work, or were created under a contractual obligation. However, the AAUP does not believe that editing on-line courses or the provision of marketing services should create ownership rights for an institution. The AAUP agrees that institution may require reimbursement for unusual financial or technical support, and recommends that such reimbursement derive from future royalties or a license that enables the institution to use the work for its internal purposes.(1)



### D. Third Parties and Ownership

Another factor to consider is how ownership may impact third party relationships including external funding and licensing. Some sponsors may want joint ownership of courses, including electronic courses, generated through their sponsorship. Some institutions have contracted with other institutions to develop on-line courses including course descriptions, syllabi and content. Institutions should be careful when engaging another entity for such work because although the institution may have paid for such work, unless a written contract expressly states that the project will be a work for hire, the developer will own the copyright of the work. The agreement should specify that the institution owns the electronic course but does not gain ownership of the creator's pre-existing materials. At a minimum, the agreement should specify that the institution has been given a license to use the electronic course for a specific purpose and length of time.

After ownership is established, the bundle of rights that typically flow from copyright ownership, e.g., the right to reproduce the work, create derivative works, distribute copies, perform and display the work, the right and responsibility to police the copyright and prevent infringement, may be negotiated. Not surprisingly, the AAUP advocates that professors retain the right of reproduction for on-line materials, the right to use such materials in future scholarly work, and the right of first refusal for future revisions.

## III. Faculty Issues

Principal concerns for faculty members in a distance education policy are ownership and the right to use, discussed above, and the workload credit, compensation and support they are given for designing and producing on-line courses. Each of the following issues must be addressed when considering the impact of on-line courses on faculty:



- Will teaching load credit be given for course development?
- Will faculty be expected to devote more time to the development of new courses after the successful launch of an on-line course?
- How much credit for on-line course development will be given during the promotion and tenure process?
- How much time will be allocated for preparation?
- Will the institution recognize that course material preparation will be altered and delivery to different student audiences may increase the work load. Recognizing that on-line teaching requires the development of new skill sets for most faculty members, what type of technical support and training will be provided?
- How will class size be affected by on-line instruction?
- How will on-line instruction affect faculty office/contact hours?

Existing faculty agreements must be reviewed to determine what type of contracts have been executed by various faculty members, e.g., is the contract written, is it a standard contract, what does the contract say about research obligations, workload, academic obligations and intellectual property. What does the faculty handbook say about curricular development, promotion and tenure and intellectual property? Has the institution adopted AAUP policy statements? If the design and production of on-line courses will be mandatory, many of the foregoing policies will need to be revised and reconciled.

Creating a new policy or changing an existing faculty policy requires a concerted effort on the part of both the faculty and administration. Good reasons for adopting or modifying the appropriate policy must be provided. The different stakeholders (e.g., tenured faculty, non-tenured faculty, students and administrators) and their agendas must be identified and consideration given to how they will be impacted by the policy. Different academic disciplines within the institution will have different perspectives, cultures and experiences with distance education. Distance education has been well-embraced by some disciplines including medicine, engineering, computing, business and foreign language studies, while its acceptance in other disciplines has been less extensive. Thus, the history department, school of medicine, business school and law school may have very different cultures and expectations regarding their use of distance learning.



## **IV. Student Issues**



### **A. Increased Access?**

A number of institutions have pursued on-line distance education programs because of the potential to improve access to students, e.g., improve educational opportunities to geographically remote students, non-traditional students, and students suffering a disability. Recent reports,<sup>2</sup> however, question the utility and accessibility of distance education. The reports indicate that although many have advocated distance education as a way to increase access to educational opportunities, poor and less educated students are less likely to have access to computers or on-line services and will not be able to participate in on-line programs. The reports also note the high attrition rate of on-line courses and query whether such access is meaningful given the low completion rate.

Further, the costs associated with distance learning are not necessarily greater or less than those for traditional face-to-face teaching. The costs are simply different, e.g., instead of traditional on-campus education costs, institutions must pay for licensing fees, royalties, technology infrastructures including hardware and software, support networks, access fees, linking fees, supplementary services for marketing, registration and testing. In fact, some institutions charge more for on-line courses than those taught physically on campus.

### **B. Serving Disabled Students?**

Some schools cite their ADA policies as a mandate to provide on-line education to the extent feasible to serve disabled students. Although distance education may serve students who have mobility disabilities, distance education is less friendly than traditional education for students suffering from certain disabilities, e.g., visual disabilities.

### **C. Privacy Issues**

Finally, institutions must consider the privacy implications for students enrolled in distance education programs. Some institutions have requested that the students participating in a distance education program execute a release or waiver permitting the rebroadcast of the student's image or on-line contribution.

## **V. Limiting Liability**



### **A. Copyright Infringement and the Fair Use Exemption**



Educators often incorporate the copyrightable works of third parties in their courses and generally rely on licensing, the Copyright Act's educational use exemption, or fair use, to do so. The May, 1999 distance education report of the U.S. Copyright Office concluded that licensing was not working well for on-line courses. It also found that the instruction or educational use exemption was of limited utility to on-line educators. In determining whether the use of certain materials constitutes fair use, the following factors are weighed and balanced: (1) the purpose and character of the use, including whether the use is commercial or educational; (2) the nature of the copyrighted work; (3) quantity and substantiality of work copied in relation to its whole; and (4) whether it will compete with or damage the market for the original work.

In general, commercial works, even commercial works with an educational purpose, generally are disfavored. Thus, an on-line course that will be marketed to other institutions may be deemed a commercial use that attenuates a fair use claim. Similarly, works that incorporate substantial portions of prior works probably will not be entitled to a fair use defense. If an individual wishes to incorporate a prior work and such incorporation will not constitute fair use, then the individual must secure a license from the copyright holder. Without a fair use exemption or a license, the incorporation of the third party's work will constitute copyright infringement.

To minimize the possibility that copyright infringement will occur, or the liability that stems therefrom, institutions should develop concise, comprehensive policies that cover the types of materials incorporated in distance education courses. The policies must be distributed to students, faculty and staff. To the extent feasible, they should acknowledge their agreement to adhere to institutional policy.

- What materials will be included in the course?
  - Who owns those materials?
  - What systems are in place to secure and monitor clearances for third party works? Do the clearances cover electronic distribution?
  - Does the first page of a distance education transmission include a copyright warning?
  - Who are the intended recipients?
  - Where will the course be transmitted? Are these "secure" sites?
- ↑  
TOP
- Will the courses be retained on institution-owned servers and equipment?
  - What technology is used to prevent unauthorized access, redistribution or downloading?
  - Do the instructors receive materials from distant sites and retransmit them?

Administrators should also take steps to secure the liability

safe harbor protections available to nonprofit educational institutions and libraries, under the Digital Millennium Copyright Act ("DMCA"), for infringing activities of faculty, staff, and students on the institution's network.

## **B. Warranties Augmenting Risk**

Further, most publishers and distributors of distance education courses require a warranty that the party with which it is entering an on-line learning agreement own or have permission to use the content and that all the permissions and releases have been obtained. The publishers and distributors also request indemnification for any losses that the publisher or distributor will incur as a result of a breach of that warranty.

## **C. Changes Proposed to Existing Copyright Law**

The existing copyright law poses serious impediments for the development of distance education. Currently, Section 110(1) of the Copyright Act allows instructors to display or perform certain copyrighted works when providing live, face-to-face instruction in a non-profit educational classroom setting.

Section 403 of the DCMA directed the Registrar of Copyrights to give Congress recommendations to promote on-line distance education. In April 1998 Senator Hatch requested an exemption from DMCA for distance education, but instead a proposal was made for a study that would consider (1) the need for an exemption, (2) the categories of works, (3) quantitative limits on portions of works, (4) parties who would get exemption, (5) parties who would be eligible recipients, (6) whether and what type of technical measures can be used to prevent access or condition eligibility for exemption; and (7) the impact of the ability to license the use of works.

In May 1999, the Registrar of Copyrights made her recommendations to Congress in a report entitled "U.S. Copyright Office Study on Distance Education."<sup>3</sup> Although the Registrar declined to propose a distance education copyright exemption at that time, ostensibly because she believed the development of new security and on-line licensing technologies may address the major concerns, she did make several recommendations for revising the copyright statute to permit limited copies of the display or performance to be transmitted to enrolled students regardless of their physical location, i.e., transmission would not be limited to classrooms. The proposed amendment would be limited to (1) non-profit educational institutions, (2) the display or performance must be in conjunction with "teacher-directed" or "mediated instruction," and (3) to the extent it is technologically sensible, access must be limited to official students and may only be retained on a server for the duration of the course. The recommendations also require institutions to develop and distribute policies that



describe copyright law to students, faculty and other members of the community; include a notice that the transmission may be subject to copyright protection; and employ technology to prevent unauthorized access or distribution.

## VI. Commercialization

### A. Commercial Entities and Agreements

A number of commercial entities, e.g., Blackboard, eCollege (formerly Real Education), Embanet, Convene, have sprung up that provide an array of design, development, production and administrative support for on-line courses developed by faculty members. The services offered by these companies varies and some allow contracts with individual faculty, departments, schools or the entire institution.

Commercial entities can help train faculty on how to design, develop, implement and manage on-line courses, convert a tradition course to an on-line course, supplement a traditional course with on-line services, conduct an entire class on-line or provide for an entire degree on-line. There are three types of on-line commercial entities: providers of course tools, providers of groupware, and providers of administrative support. Some vendors just provide course conversion software. Other vendors provide only a software platform from which professors can present an array of text and multimedia course material, conduct on-line discussions (real time or asynchronously) and manage testing. Other vendors convert courses to electronic format, train teachers to teach on line, maintain servers and operate help desks for students and professors.

A principal advantage of the commercial entities is the marketing of on-line courses to students not enrolled at the institution. In addition to including the courses in an on-line catalogue which is marketed to students through print, broadcast and on-line media, commercial entities provide services that include enrollment marketing consulting, international student recruitment and corporate student recruitment.

Although most commercial on-line design, development and production companies offer no warranties and representations, e.g., they do not warrant uninterrupted delivery, error-free delivery, or the accuracy, reliability or content of a course, they often require the content provider to make warranties and representations regarding their ownership or licensing of the content that is provided to them for distribution. Most require the provider to warrant that all appropriate releases and permissions have been obtained. Further, some require content providers to represent that they will not (1) post or transmit objectionable content whether it is unlawful, threatening, libelous, harassing or pornographic; (2) disrupt normal communications with those accessing the site; (3) post

advertisements, promotions or solicitations; or (4) alter or delete content. Most of the commercial entities do not claim ownership of the content of the course, but claim ownership of the means of delivery.

### **B. Consortia**

In addition to or in lieu of the use of commercial entities to market on-line courses, some institutions have entered various consortia to market their courses. For example, 14 research institutions<sup>4</sup> joined forces to market their distance education programs through an on-line directory named R1.edu. The consortium will not offer degrees or academic services of its own. Credits and degrees will be offered by member institutions. The consortium essentially offers a directory of on-line courses. The universities pay nothing to participate, but provide information for the directory. Some of the participating institutions have courses cross-listed with other on-line directories.

### **C. Royalties/Licenses**

Finally, to the extent that the institution elects to commercialize an on-line course to serve populations other than those taught by the professor, consistent with the institution's intellectual property policy, a royalty agreement or license fee split usually is structured with the contributing faculty.

## **VII. Teaching Beyond State and International Borders**

In addition to state regulations, institutions must address regional accreditation barriers and federal financial aid implications.

### **A. State Approvals**

An institution considering offering distance education courses in another state or country must determine whether they need approval from accrediting organizations or higher education boards in the states in which they intend to transmit distance education programs. The critical issues are whether the courses will be offered for credit and whether there is a "physical presence" of the institution in the state where the course will be delivered. In some states, approval is required even if a course is not offered for credit and the converse is true in other states, i.e., approval is not required even for credit.

Unfortunately, states have adopted varying definitions of "physical presence." Generally, if students are "aggregated" at a site by the institution, states will hold that an institution has a physical presence in that state. If students receive the distance

course in the privacy of their homes or offices, the states generally will hold that the institution does not have a physical presence. However, it is unclear whether or not an institution will be deemed to have a physical presence if a company makes its facilities available for employees to attend a distance education class or the students themselves arrange to gather to receive a distance education course.

Similarly, if a domestic educational institution is considering serving as the distance learning center for a foreign educational institution, not only may the foreign institution be deemed to have a "physical presence" within the state of the domestic institution, but the domestic institution may be deemed to have undergone a "substantial change" for accreditation purposes.

## **B. Accreditation**

Although some schools offer distance education as a supplement or adjunct to traditional education, Western Governors University, Britain's Open University, National Technological University, and Canada's Athabasca use it as the only mode of teaching. Many are seeking accreditation as a validation of quality and because regional accreditation is a condition for receipt of federal funds.

In March 1999, the North Central Association of Colleges and Schools made Jones International University ("Jones") the first institution offering its courses entirely through distance education programs to achieve regional accreditation. Jones offers a bachelor's degree and a master's degree in business communications. The AAUP criticized the accreditation arguing the lack of quality was reflected in the high number of adjuncts, the short duration of the courses, the small portion of students who seek degrees, and the lack of learning resources such as libraries.

Western Governors University, which offers degrees in general education, network administration, electronic manufacturing and learning and technology, is working with the Interregional Accrediting Committee.

For-profit universities also are seeking accreditation. For example, Harcourt Learning Direct, will seek permission to grant degrees from the Massachusetts Board of Higher Education and accreditation from the New England Association of Schools and Colleges.

## **C. Financial Aid**

With respect to financial aid implications, under Section 484(m) of Title IV of the Higher Education Act of 1965, students enrolled in courses delivered through the use of telecommunications are treated the same as traditional students (i.e., face-to-face) when financial aid is awarded. In short, a student enrolled in a telecommunication-based course is entitled

to full financial aid adjusted only if the delivery method "substantially reduces the cost of attendance" to the student. The law excludes from eligibility to participate in Title IV federal financial aid programs those institutions that offer more than fifty percent of their courses through telecommunications and correspondence studies. Because the law is based on the number of courses and not the number of enrolled students or the number of sections, the problem of large distance education classes or on-line sections is avoided. Finally, institutions can convert their correspondence courses into courses that are eligible for financial aid coverage by adding a meaningful telecommunications component.

### VIII. Conclusion

Developing a distance education policy presents a variety of issues and challenges. Most institutions need to examine a host of existing policies, which will likely require revision, and the creation of new policies and procedures to limit liability.

*ACE wishes to acknowledge the substantial contribution in the writing of this paper by Debra M. Parrish, Esq. and Alexander Wells Parrish, both of Pittsburgh, PA.*

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