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Editor's Podium

The focus of this issue is Intellectual Property and Copyright Issues. The DMCA, Digital Millennium Copyright Act, is of course still with us. The increased activity of the past two years, particularly in the music-on-line arena, has complicated issues of the creatively underpaid (to coin a wonderful phrase from Stephen Downes).

We have presented thoughtful, well-researched articles advancing several positions. There is a comprehensive list of Copyright Links also from Stephen Downes. We have included information from the Committee on Intellectual Property of the College Art Association on the fifth annual Copyright Town Meeting. Finally, in the 'Amicus Brief' we cover the implications of expansion of copyright law to curtail values within the First Amendment. Awareness is critical for those of us in knowledge sharing.

The U.S. Secretary of Education's Conference on Educational Technology: Measuring the Impacts and Shaping the Future is presented as the most current research and findings in this key area.

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On January 12, 2001 the final report from the U.S. Secretary of Education's Conference on Educational Technology: Measuring the Impacts and Shaping the Future was made available. This is truly a milestone report and a goldmine for current data and ideas. It pulls together the conference plenary sessions, white papers, and the work of conference participants in break out sessions.

Below is core information from the Final Conference Report. For links to additional speeches and testimony, spotlight schools, demonstration projects and evaluation tools, go to the Department of Education website at <http://www.ed.gov/Technology/techconf/2000/index.html>

The Secretary's Conference on Educational Technology 2000: Measuring the Impacts and Shaping the Future

The Critical Questions:

What constitutes the effective use of technology in learning? What value does technology bring to learning?

Will we recognize effective uses of technology when we see them?

What uses of learning technology does the public value?

What conditions must be in place in schools to ensure effective technology use?

How can we successfully gauge and report progress with technology at the educator proficiency and system-capacity levels, as well as at the student performance level?

What is the policy roadmap that would build the capacity of communities and schools to move toward more effective uses of technology in schools?

What can we learn from business and industry?

Introduction

How should the value of technology to learning be measured?

Can new assessment tools based on emerging technologies provide deeper insight into what a child is learning and how that child's learning might improve?

The Secretary's Conference on Educational Technology 2000: Measuring the Impacts and Shaping the Future, highlighted a growing sophistication in K-12

schools' use of technology for teaching and learning.

The 1999 Secretary's Conference: Evaluating the Effectiveness of Technology, acknowledged the quandary before school boards across the country--could it be shown that technology works, that it is making a difference in children's learning? While the press reported that over \$7 billion was spent annually on technology in schools, educators were finding it a challenge to document results.

The topic resonated with educators across the country; they attended the conference in record numbers. In many ways, that first conference focused on a crossroads in which to bring together disparate groups--researchers, the evaluators, and the practitioners--to begin the conversation around this important topic.

That first conference established several precedents--it convened the right people around the right topic, in an atmosphere charged with urgency (see). Designed to engage participants in dialogue, it resulted in three advances: new insight into the right questions to be asking, dawning recognition of the team of players required to answer them, and the acknowledgement of the importance of--and lack of progress in--this arena. Important conversations were held at that conference, and while participants left with more questions than answers, they left with a deeper understanding of the complexity of the issue. Many left as members of virtual teams--charging forth to put collective will and wisdom to the pressing questions raised.

In September of 2000, the second national conference was convened to sustain the momentum generated by the first. Today, the nation is more determined than ever to demand accountability from education--and technology is a big-ticket item for most schools and for the nation.

The conference program was designed to build on the question set to the left and the commissioned white papers--engaging participants in facilitated breakout sessions informed by provocative plenary speakers, spotlight schools and exhibitors.

Question 1: What constitutes the effective use of technology in learning? What value does technology bring to learning?

A publication referenced by many speakers during the course of the conference was **How People Learn: Brain, Mind, Experience and School**, a 1999 report by the Committee on the Development of Learning Sciences for the Commission on Behavioral and Social Sciences. The book describes effective learning environments as the integration of four dimensions: learner centered, knowledge-centered, community-centered, and assessment-centered.

Recent neurocognitive research suggests that the richness of early learning experiences affects the physical development of the brain and may be a major cause of intellectual development.

-Margaret Riel, Associate Director of the
Center for Collaborative Education (CCRE)

Real life learning is often characterized as playful, recursive and non-linear, engaging, self-directed, and meaningful from the learner's perspective. Motivation and learning look like the natural processes they are in real life learning - but they rarely seem so in most school settings.

-Barbara McCombs, Director of the Center for Human Motivation, Learning and Development

Studies did find improvements in student scores on tests closely related to material covered in computer-assisted instructional packages (Kulik & Kulik, 1991).

-Quoted by Margaret Honey, Director of CCT

What it means to be educated for today's digital age is decidedly different from what it was just a decade ago. To succeed today, students need collaboration, online communication, visualization, information literacy, and life-long learning--twenty-first century--skills.

-Cheryl Lemke, Metiri Group

Research has demonstrated that authentic tasks with real audiences have resulted in increased learning, stronger writing, longer retention of learning and even increased performance on standardized tests of writing.

-Margaret Riel, Associate Director of the Center for Collaborative Education (CCRE)

Profound learning happens when models student build to simulate reality meet data students collect. The combination of sophisticated data acquisition from probes and Internet databases with models that can be compared to data, can lead to breakthroughs.

-Robert Tinker, Concord Consortium

Technology prompts a higher level of engagement of students in the classroom.

-Participant Comment on Engagement

Technology adds a component of collaboration where learning is not contrived.

-Participant Comment on Collaboration

Technology enables us to be more learner-centered. It reaches all kids--technology can even out the differences.

-Participant Comment on Individualization

These are skills students will need to get a job--and be successful in the world of work.

-Participant Comment on Real-World Skills

Students and teachers both have access to information that they couldn't get from the library.

-Participant Comment on New Access to Information

They (students) need to be able to use technology to solve problems--real-world problems.

-Participant Comment on Thinking Skills

Rather than assessing the benefits of technology, the focus of technology assessment will be to explore how to enhance those benefits by matching them to learner needs combined with information on how learning best occurs.

-Barbara McCombs, Center for Human Motivation, Learning, and Development

Technology can make assessments of the kinds of skills needed for the 21st century knowledge economy more feasible--providing assessment tasks that mimic the features of real-world problems and providing portable, easy-to-use templates for collecting and storing classroom assessment data.

-Barbara Means, Bill Penuel and Edys Quellmalz, SRI International

Conference participants, cognizant of the need for integrated learning environments and the multiple ways in which technology enables educators to create such environments, drew the following conclusions:

- Breakthroughs in technology have advanced what is known about how children think and learn.
- Research shows that, under the right conditions, technology advances children's academic achievement.
- Technology's tremendous influence on society has changed what children need to know and be able to do to be successful today
- Emerging technologies can and should be used to more accurately assess what and why children are or are not learning.

Whether doing things differently, or doing different things, the transitions represent significant change for schools. Each of the conclusions is discussed in more depth below:

- Breakthroughs in technology have advanced what is known about how children think and learn.

Advances in imaging by the medical field have opened doors to the study of the way the human brain functions--in essence providing a window on how people think and learn. The convergence of brain research, cognitive learning theory, and technology documents the importance of engagement by the learner in their own learning. This provides strong support for the inclusion of real-world applications, problem-based and project-based learning, higher order thinking, and constructivist learning.

- Research shows that, under the right conditions, technology advances children's academic achievement. The context in which technology is used is key to its effectiveness. While the use of technology in schools is still in its infancy, enough exploration has occurred to warrant serious research and development to document research findings and best

practices.

- Technology's tremendous influence on society has changed what children need to know and be able to do to be successful today. Technology has caused tremendous shifts in today's society--economic, political, social, and civic. Acknowledgment of these shifts changes the question before schools from "if" technology belongs in schools to "what" constitutes an excellent education in this digital age, and "how" schools use technology effectively to advance student learning.

The North Central Regional Educational Laboratory has recently launched their enGauge website with a new list of 21st century skills:

21st Century Skills © NCREL

Digital Age Literacy

- Basic, Scientific, and Technological Literacy
- Visual and information Literacy
- Cultural Literacy and Global Awareness

Inventive Thinking

- Adaptability/Managing Complexity
- Curiosity, Creativity, and Risk Taking
- Higher Order Thinking and Sound Reasoning

Effective Communication

- Teaming, Collaboration, and Interpersonal Skills
- Personal and Social Responsibility
- Interactive Communication

High Productivity

- Prioritizing, Planning, and Managing for Results
- Effective Use of Real-World Tools
- Relevant, High Quality Products

Participants in the breakout groups at the conference emphasized the importance of these skills--and expressed frustration that, while 21st century skills should be included in today's curriculum, high stakes testing was a huge deterrent from doing so (see the discussion below).

Story: Conquering the World with Technology

Imagine 1st and 2nd graders tapping into I*EARN to learn to read, explore mathematics, travel (virtually) around the world, and discover other cultures. The children in Kristi Rennebohm Franz's classroom in Pullman, Washington are innately using language to make sense of their world, to launch their literacy, and to communicate their essential learning (content standards in Washington State).

Emerging technologies should be used to more accurately assess what and why children are (or are not) learning--and how technology can help. Even as

teachers are beginning to engage their students in more hands-on discovery, they lack the skills to fully capture what students are learning. In fact, students see the inquiry-based aspects of learning as fun--but not serious learning--since their grades reflect only standardized tests based on the textbook with no recognition of what they might have learned in field experiments.

Story: Hands-On Learning

In an inner-city high school physics class in Chicago, students are examining computer images captured by automated telescopes. Developed at UC Berkeley's Lawrence Berkeley Lab with support from TERC, the Hands-On Universe project involves students in reviewing images from space. Two Hands-On Universe student groups have in fact discovered previously unknown super novas and had their work published in scientific journals. The kinds of complex investigations, deeper understanding, and ability to apply concepts to new situations fostered by technology-supported programs like Hands-On Universe are difficult to capture with conventional test formats.

Question #2: Will we recognize effective uses of technology when we see them?

Five key ways in which technology adds to learning:

- Real world contexts
- Connections to outside experts
- Visualization and analysis tools
- Scaffolds for problem solving
- Opportunities for feedback, reflection, and revision.

-From "How People Learn," John Bransford et al, as quoted by Barbara Means, SRI

SCANS Three-Part Foundation:

1. Basic Skills: Reading, writing, arithmetic, listening, speaking
2. Thinking Skills: Creative thinking, decision making, problem solving, seeing things in the mind's eye, knowing how to learn, reasoning
3. Personal Qualities: Responsibility, self-esteem, sociability, self-management, integrity

...Teachers may feel anxious about devoting precious instructional minutes to technology-based activities that are not preparing students to do well on mandated multiple-choice tests.

-Barbara Means, Bill Penuel and Edys Quellmalz, SRI International

Students who use computers regularly see measurable improvements in the quality of their writing...[but] recent research shows that paper and pencil tests severely underestimate the achievement of students accustomed to writing on computers.

-Michael Russell, Center for the Study of Testing, Evaluation, and Education Policy

Technology can make assessments of the kinds of skills needed for the 21st century knowledge economy more feasible--providing assessment tasks that mimic the features of real-world problems

-Barbara Means, Bill Penuel and Edys Quellmalz, SRI International

The indicators of effective uses of technology have yet to be determined.

There is a growing sentiment that the assessment of the impact of technology on learning involves more than just a look at changes in test scores--unless those test scores reflect the 21st century skills students need to succeed today. Content standards are still important, but they are no longer (if ever they did) represent the full profile of what students need to know and be able to do to succeed in a digital age.

The Secretary's Commission on Achieving Necessary Skills (SCANS) was appointed by the U.S. Secretary of Labor to outline the skills students need to succeed in the working world. As outlined in the report, high-performance learning organizations require workers who are well grounded in:

- Basic literacy and computational skills
- The thinking skills necessary to put knowledge into practice
- Personal qualities that demonstrate dependability, sociability, self-management, and honesty

Schools are struggling to find common ground between the traditional and the new.

On the one hand, they acknowledge the necessity of immersing students in learning within the context of contemporary technology tools. On the other, most current assessments do not address 21st century skills--and thus provide disincentives to teachers devoting learning time toward that end.

Schools need to become high performance, high technology systems.

In order to use technology effectively, the school has to evolve into a learning system that embraces the effective use of technology. That translates into learning cultures that are open to innovation--systems that judge the merit of an idea not by its fit with rules and regulations, but its usefulness to advancing the mission of schools, learning.

Four technology and assessment projects launched at the 1999 Conference were back this year to report their progress:

- Mantua Elementary School, Fairfax Co., VA
- Snapshot Service, a cooperative between University of Michigan and the University of Texas
- Montgomery County Public Schools, MD
- Reports for the above three projects are available online.

- Cherry Creek School District, Colorado, in partnership with CRESST, UCLA

Question #3: What uses of learning technology does the public value?

Currently, report cards are the most important reporting program. If a report card states that math, reading, science, music, etc. are the areas of focus and emphasis, versus a focus on critical learning, problem solving, etc., when report cards go home the parent thinks math, science, etc. is the most important learned skill. We need to make a paradigm shift. How do you translate student problem solving skills into the report card at the end of the term?

-Conference Participant

Margaret Riel set the stage for this answer in her white paper. "Educational goals are tied to learning environments; as one changes so must the other. Literacy goals 100 years ago for many students were to be able to read and write names, copy and read texts, and generate lists of merchandise. Literacy goals of today require mastery over many different genres of writing: persuasive, expressive, expository, procedural and expect students to be able to interpret, compare, contrast, and analyze complex texts. These differences in learning goals also hold for mathematics. Students learn the mathematical foundations necessary for careers that did not exist 100 years ago. There has been exponential growth in the amount of recorded knowledge so that memorization of factual information is no longer an effective approach to mastery of a field."

Even as participants at this conference were espousing the importance of the 21st century skills listed above, they were at the same time lamenting the fact that the public has not fully embraced those skills as being as important as reading, writing, science, and mathematics. In part, it is the responsibility of educators to educate and inform the public as to what should be emphasized in schools.

Question #4: What conditions must be in place in schools to ensure effective technology use?

We need to change the culture. Teaching needs to become a profession.

-Lynn Schrum, Conference Participant, University of Georgia

We need an enabling and capacity-building culture...[that is] learner-driven and research-based.

-Cheryl Lemke, Metiri Group

If teachers can see how technology impacts what they teach and are provided with the right tools, they will use the technology.

-Conference Participant

To move toward this vision will require new concepts defining the learning process and the evolving purpose of education. It will also require rethinking current directions and practices.

-Barbara McCombs, Director of the Center for Human Motivation, Learning and Development

It's not so much proving that we're doing something as having good communication and filling up the screens with the kinds of benefits and results that the community says that's worth the money.

- Bernajean Porter, Education Technology Planners

We can ask administrators to create environments where technology can be used for learning, as well as for teaching, and where both learners and teachers have sufficient access to computers and telecommunications to do their work.

-Saul Rockman, Rockman et al

Education is a human enterprise. It is dependent on the relationship between teachers and learners in a specific social, political, and historical context.

-Margaret Riel, Associate Director of the Center for Collaborative Education (CCRE)

[We should be focused on] building heterogeneous groups of individuals who are all looking at the same kind of project but who bring different skills to the mix.

-Jim Nazworthy, High Plains R*TEC

The personal connections are very important. It's not just about the technology. In fact, it's not about the technology at all; it's about hooking up people to concentrate on common problems or cases.

-Robert McNergney, University of Virginia

One major advantage of embedding assessment within learning activities is the heightened focus on learning outcomes... Teachers must think about the kinds of skills and knowledge they are trying to impart through learning activities, and this reflection in turn supports better activity design and better articulation of learning goals to students.

-Barbara Means, Bill Penuel and Edys Quellmalz, SRI International

The vanishing of the digital divide defined as access to technology in the U.S. will not, of course, rectify the deplorable inequities in U.S. schools.

-Robert Tinker, Concord Consortium

Teaching is an emergent, interactive constructed activity that requires a complex blend of knowledge of the students and knowledge of the curriculum.

-Margaret Riel, Associate Director of the Center for Collaborative Education (CCRE)

While much of the funding for the e-rate has gone to high poverty schools, the

poorest of the poor are not yet benefiting as much as they should.

-Former Secretary of Education Richard Riley

There appears to be a policy disconnect between those who fund technology and establish rules and regulations for its use, and those who actually work in the districts and schools and classrooms.

-Saul Rockman, Rockman et al

Lacking familiarity with ways to test deeper understandings or higher-order skills...teachers often implement [an] activity without assessing what students are learning from it.

-Barbara Means, Bill Penuel and Edys Quellmalz,
SRI International

We are hitting the same group of teachers every time. I need to know how to reach the next group, the non-innovators.

-Conference Participant

If students and teachers are to take full advantage of what technology makes possible in teaching and learning, schools must change. They must become more student-centered, more focused on 21st century skills, more open to innovation through technology, more willing to fully support and grow the infrastructure they install, and they must be lead by educators who recognize the critical role technology plays in defining an excellent education in this digital age. This won't happen without changes in the K-12 assessment.

The top five Conditions for a high-performance, high-tech school (as reported by conference participants):

1. Shared Vision is:

- Well-defined
- Research-based
- Consistent
- Motivating

and involves:

- All stakeholders
- Trust
- A plan for ongoing funding, equipment and training updates

2. Communication among all stakeholders is:

- Regular and ongoing
- Based on shared goals
- Technology-based

and provides for:

- Feedback on what works/what doesn't
- Opportunities to share progress

3. Leadership is:

- Strong
- Supported by the vision
- Ongoing
- Motivating

and it:

- Facilitates change
- Makes curricular and instructional connections explicit
- Engages other staff and community members

Recognizes the ongoing need for meaningful professional development among all staff

4. Community Connections are:

- Local
- Regional
- Global
- Mutually beneficial
- Formal
- Technology-supported
- Ongoing

5. Assessments are:

- New
- Clear
- Aligned to digital age content standards
- Technology-based
- Focused on learning outcomes

Two additional essential conditions must be in place to facilitate effective use of technology as well: equitable, robust access and educator proficiency.

Equity is more than access. A first step toward equity is equal access to up-to-date equipment and high-speed access to the Internet, both during and outside the school day and in all schools. Nevertheless, such access, while critically important, is only as good as the students' ability to use it toward meaningful goals.

Think Box: Literacy Equity

...Technology will greatly reduce the amount of teacher time required for literacy instruction...resulting in huge technology breakthroughs. This could result in literacy gains worldwide, while decreasing the advantage families have that can find the time to read to their children extensively.

-Robert Tinker, Concord Consortium

Teacher proficiency is key. Educators are waking up to the fact that this movement is not about technology--this is about extending children's intellectual capacity through the use of contemporary tools. It is up to teachers to create the powerful learning situations where technology can enrich and extend the experience of students.

The most serious Barriers to significant, effective uses of technology for learning (as reported by participants) are:

Age of:

- Equipment
- Wiring
- Facilities
- Attitudes

Lack of:

- Ongoing support
- Communication
- Training for technical skill and implementaion
- Active leadership
- Accountability/benchmarks
- Vision and clear goals
- Equipment
- Funding
- Clear expectations
- Creative, alternative curricular solutions
- New certification requirement

School Culture:

- Isolation
- Reluctance to change (further hindered by union contracts)
- Time/scheduling inflexibility

Voters and Policymakers:

- Public resistance and fear
- Lack of knowledge
- Resistance to funding measures
- Lack of accountability
- Expectation of short-term returns

Question #5: How can we successfully gauge and report progress with technology at the educator proficiency and system-capacity levels, as well as at the student performance level?

The question is: Can we work smarter, not harder? What does it really take to build the capacity of our system?

-Cheryl Lemke, Metiri Group

People are being assessed on technology using paper and pencil, multiple choice tests.

-Karen Brumley, Conference Participant and teacher:
Pickerington Junior High School, Pickerington OH

Until tests that measure the types of learning enabled by computers are developed, it is likely that the public and policymakers will under-value the types of learning influenced by computers. In turn, the public and policymakers will continue to underestimate the impact computers have on student learning.

-Michael Russell, Center for the Study of
Testing, Evaluation, and Education Policy

EnGauge, presented by Cheryl Lemke, Metiri Group

Four Cornerstones, presented by Bernajean Porter, Education Technology
Planners

Profiler, presented by Jim Nazworthy, High Plains R*TEC

CEO Forum STaR Chart, presented by Cheryl Williams, National School Board
Association

SEIR*TEC, SouthEast and Islands Regional Technology in Education
Consortium

New ways of assessing and reporting progress are needed.

Despite advances made in the effective integration of technology into instructional settings, a key barrier remains: the need for a quality gauge of student, educator, and systems progress.

Barbara Reeves, state technology director in Maryland, spoke on two key elements to school reform efforts:

Accountability: *setting very specific standards and targets and measuring progress toward those targets...also making our progress very visible.*

and

Data-driven decision-making: *using the data we're collecting to make key decisions, all the way from the shape of instructional programs in a classroom or school [to] the forming of state budgets.*

New evaluation tools are needed.

On day one of the conference, Margaret Honey, Director of the Center for Children and Technology, moderated a panel of experts who discussed several evaluation tools for educators. Developed by both for-profit and not-for-profit groups, as well as a consortium of business and industry leaders, these tools are designed to help schools:

Cooperate and collaborate Share expertise and assistance Use technology

effectively for teaching, learning and managing Assess and track their progress in relation to established, research-based benchmarks.

Miles to go before we sleep--much yet to be accomplished.

Educators, researchers, business leaders, and other stakeholders are working hard to develop comprehensive ways to gauge and report progress on all three levels. More work is needed and many questions remain unanswered. Conference participants took a major step by delving into these questions and the complex issues behind them, but the process is ongoing.

Question #6: What is the policy roadmap that would build the capacity of communities and schools to move toward more effective uses of technology in schools?

We often talk about school board members and other policymakers as them and us. They are us, and we need to educate them. They are not the enemy.

-Conference Participant

Thirty second sound bites aren't really improving the discourse on education.

-Conference Participant

Schools need to undertake major changes to fully exploit technology.

-Robert Tinker, Concord Consortium

While these assessment prototypes are still under development, they do offer illustrations of the way that technology can make classroom assessment of complex skills more feasible.

-Barbara Means, Bill Penuel, Edys Quellmalz,
SRI International

More recent research, however, shows that young people who are accustomed to writing with computers perform significantly worse on open-ended questions (that is, not multiple choice) questions administered on paper as compared with the same questions administered via computer (Russell & Haney, 1997; Russell, 1999; Russell & Plati, 2000).

-Michael Russell

The possibilities:

... For teachers:

The rapid changes in standards, assessment, content, curricula, and educational technologies create a massive need for ongoing professional development. Effective online courses can revolutionize professional development. But a set of economic, political, and practical problems must be solved.

- For the teaching of literacy:

Technological tools will become increasingly important in teaching literacy and second languages to children, adults, and special students.

- For access to resources:

The value of a textbook and its ancillary materials is that it represents a coherent aggregation of resources and educational activities. Technology can provide the benefits of aggregation while avoiding the costs, inflexibility of a text and constraints of needing to own all the materials.

-Robert Tinker, Concord Consortium

Participants spoke positively about the need to develop deeper relationships with policymakers. There is a prevailing belief that keeping the lines of communication open is the key to satisfying everyone's needs. At the same time, there were two distinct notes of caution sounded. The first is that policymakers should not expect short-term results of incredible magnitude. They must acknowledge that investment in educational technology is an investment in the future. Second, educators and administrators acknowledged that they can and should play a more active and honest role in keeping policymakers informed of real gains.

Participants recommended showcasing student successes directly to board members and other policymakers, going to their offices, inviting them into classrooms, and keeping community and business partners informed at the local level so that knowledge can "move up the system."

They recommended policy actions to enable the education community to:

- Embrace twenty-first century skills as high stakes learning goals. What is tested is taught. Once twenty-first century skills are accepted as essential to an excellent education--and associated assessments are developed--educators will begin the serious work of incorporating those skills into academic content and curriculum.
- Develop new technology-based tools that more accurately assess student learning--including 21st century skills. Emerging technologies hold great potential for more accurate and efficient assessment of what students are learning. With these tools in hand, teachers and students could be more prescriptive and deliberate about what is expected, how much progress is being made, and what course corrections are required along the way to optimize student learning.
- Develop technology-based assessments addressing twenty-first century skills. Educators need alignment between the realities of today's knowledge-based digital age, the content standards, and the high-stakes testing in schools. Right now, while their common sense suggests that new 21st century skills--in the context of content standards--should be a focus of learning, in most states high stakes tests don't address such foci, creating a critical disconnect that must be overcome.
- Establish a base of research and proven practice about technology, children, and learning to inform decision-making. The rate of change of emerging technologies renders many long-term studies irrelevant by the time they are completed. Education needs new research methods that provide continuous insight and data to guide decision-making about technology in schools.
- Implement innovative and effective uses of technology for learning. While

many schools are reaching a critical mass of infrastructure, most are not yet using their technology in innovative ways. To do so will require new visions of learning that reflect advances in brain research, cognitive learning theory, and technology. Due in part to the decentralized decision-making in schools for products and services, relatively little money is being invested in the development of innovations that apply emerging technologies to learning and teaching. Yet the possibilities are endless

- Evolve Schools into High Performance, High Technology Systems. In order to use technology effectively, the school has to evolve into a learning system that embraces the effective use of technology. That translates into learning cultures that are open to innovation--systems that judge the merit of an idea not by its fit with rules and regulations, but its usefulness to advancing the mission of schools, learning.

Question #7: What can we learn from business and industry?

There are no multiple choice questions in business.

-David Polashek, Conference Participant, Superintendent, Oconto Falls Public School District, Oconto Falls WI

Creativity, being able to stay on task is critical. The state capital of Vermont is not, as long as students know how to get the information when they need it...[When hiring] I want to get a sense of how people think through issues. Imagination is more important than knowledge. So how do you make the connection between the two?

-Jeffrey Orloff, Conference Participant, Apple Computer, Inc.

[The best community partners] see that it's in their best interest to help strengthen schools and to give frameworks and support for school districts to be able to make change happen.

-Cheryl Williams, National School Board Association

There is a growing sense that business models have a lot to offer schools.

Despite differences in culture and patterns of technology use, increasing numbers of school partnerships with businesses have revealed some important common threads. Several of this year's participants mentioned the valuable experience of "being on both sides of the fence," having worked in education and moved to business or vice versa. In addition, business and industry leaders often have a solid sense of critical 21st century skills and can offer educators key connections to the real world environment in which they are used.

Robust and equitable access to technology, conference participants agreed, goes beyond school and district buildings. Many suggested that good business partnerships were necessary for ensuring after-hours access.

Story: Kinko's for Kids

Lorin Somerlot, a teacher at New Albany High School in Ohio, spoke of the success of her school's partnership with a local Kinko's. The copy center, located on the school campus and run as a Kinko's franchise (in partnership with the Columbus Metropolitan Library), is known as Kinko's for Kids. Lorin proudly points out that the center is entirely self-funded. With its many computer workstations, students have ample opportunity to access technology even when they can't at home.

According to Eric Benhamou, a keynote speaker from 3Com, educational stakeholders would be wise to mirror industry trends to increase access to technology. Benhamou sees these trends as involving the following:

- From plain to rich connectivity
- From general purpose devices to special purpose devices
- From large enterprises to smaller sites

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Editor's Note:

This is a working copy of a brief on the current Copyright Law from the DEOS Listserv. The outcome threatens to significantly reduce access to information. It adds a fifth ring of liability if the site is indirectly linked to a site with a copyright infringement. Peter Jaszi provided the following introduction on the Listserv:

The attached document is the penultimate draft of a brief prepared by Ann Beeson of the ACLU, with contributions from various hands (including Pam Samuelson and -- to a much lesser extent -- myself) arguing (among other things) the constitutional infirmity of Judge Kaplan's decision in the 2600.com DeCSS case (Universal v. Remeirdes) in light of the first amendment. The brief will be filed with the Second Circuit court of Appeals in connection with the appeal of that case. It is not being circulated for potential DFC sign-on, but so that individual member organizations can consider whether they might wish to join on their own behalf. The deadline is soon -- close of business on the 23rd. Signons and questions should be addressed to Ann Beeson: ABEESON@aclu.org.

Amicus Brief

By Ann Beeson

Introduction

The First Amendment has long been recognized as a necessary limitation on copyright law. [i] Any expansion of copyright protection must survive careful constitutional scrutiny to ensure that creative expression is fostered rather than stifled by the grant of additional rights to copyright holders. [ii] The Digital Millennium Copyright Act (DMCA) represents an unprecedented expansion of copyright law. To comprehend its scope, and the First Amendment problems it presents, it is helpful to conceptualize copyright protections as consisting of concentric rings of liability to copyright holders. [iii] At the core is direct liability for copyright infringement. [iv] In the next ring are the indirect liability doctrines of contributory infringement and vicarious liability that courts have read into copyright law through case-by-case adjudications. The DMCA adds a third ring of indirect liability for circumventing technology designed to protect copyrights, [v] and a fourth ring for trafficking in circumvention technology. [vi]

To these, the district court decision in this case would add yet a fifth ring of indirect liability based on mere links to sites containing circumvention technology. As the circles of indirect liability expand outward, the amount of speech in the public domain -- speech freely available for use by others -- shrinks to the detriment of First Amendment values. [\[vii\]](#)

While courts have imposed indirect liability for copyright infringement in certain circumstances, any expansion of indirect liability presents grave constitutional problems if imposed without regard to (1) whether there were any underlying acts of infringement; (2) whether any relationship exists between the actual infringers and the person the plaintiff seeks to hold indirectly liable; and, most importantly, (3) whether a fair use or other free speech defense applies. Yet, in *Universal City Studios, Inc. v. Corley*, a journalist was held liable under the DMCA as a trafficker in circumvention technology for posting and linking to a computer program known as DeCSS even though there is no proof that the posting of DeCSS has caused any underlying acts of infringement of DVD movies in which the plaintiffs own copyrights. Nor is there proof that this defendant either substantially contributed to copyright infringement or had any ability to control the acts of any users of DeCSS, as previous indirect liability standards would require. Even more fundamentally, the district court in this case held that there is no fair use or First Amendment defense to a charge under the anti-trafficking provision of the DMCA.

Section I of this brief explains why courts must carefully scrutinize any expansion of liability to copyright holders to prevent encroachments on speech protected by the First Amendment. Section II argues that the anti-circumvention and anti-trafficking provisions of the DMCA must be narrowly construed to comply with constitutional constraints, or else must be struck down as unconstitutional. Section III argues that the communicative act of linking to sites containing circumvention technology does not violate the anti-trafficking provisions of the DMCA as properly interpreted, and that an extension of liability to links would be inconsistent with the First Amendment.

I. Copyright Law Has Historically Recognized the Need for Careful First Amendment Balancing.

A. The First Amendment Requires That Any Expansion of Liability to Copyright Holders Survive Careful Scrutiny.

The DMCA's anti-circumvention and anti-trafficking provisions punish entirely new categories of non-infringing, protected speech, and create the third and fourth rings of liability outlined above. Congress believed that this expansion of liability was necessary to prevent "massive piracy" that might be facilitated by the ease with which digital works can be copied and distributed worldwide virtually instantaneously. Sen. Rep. at 8. The anti-circumvention provision was intended to encourage[] technological solutions & by enforcing private parties use of technological measures with legal sanctions for circumvention & *Id.* at 11. The provision would supplement the copyright law by promoting the use and effectiveness of technological measures. See *id.* at 9. The anti-trafficking provisions would, in turn, supplement[] the prohibition against the act of circumvention . . . with prohibitions on creating and making available

certain technologies & developed or advertised to defeat technological protections against unauthorized access to a work. House Rep. at 18.

This expansion clearly implicates the First Amendment. As the district court recognized, the circumvention technology prohibited by the anti-trafficking provision is itself speech. [ADD QUOTE]; see also *Bernstein; Junger*. The anti-trafficking provision also inhibits access to lawful speech by outlawing the technology needed to obtain that speech. In addition, the anti-circumvention provision of the DMCA on its face prevents access to protected, noninfringing speech because it prohibits circumventing access to *any* speech protected by access control technology regardless of whether the user has a free speech right to access it. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas."); see also *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Given their direct application to protected speech, there is no basis for qualifying the level of First Amendment scrutiny that should be applied to the DMCA provisions. *Reno v. ACLU ("ACLU I")*, 521 U.S. at 870. Even if Congress' asserted interest is compelling, [viii] the First Amendment inquiry does not end. *ACLU I*, at ___; *Simon & Schuster*; see also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 167-68 (1998) ("Enjoining or punishing noninfringing speech [in a copyright action] would thus be an unconstitutional restraint of First Amendment protected expression."). To survive constitutional scrutiny, the anti-circumvention and anti-trafficking provisions of the Constitution must be narrowly tailored to achieve a compelling government interest. [ix]

B. The Fair Use Doctrine Has Traditionally Served to Ensure that Copyright Laws Are Narrowly Tailored in Accordance with the First Amendment.

Traditionally, the fair use doctrine has ensured that copyright laws are consistent with the First Amendment. See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (suggesting the constitutional dimension of the fair use doctrine). One of the constitutional roots of fair use was set forth by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing U.S. Const., Art. I, sec. 8): [S]ome opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, to promote the Progress of Science and useful Arts. " See also *id.* at 577, quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (fair use permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is intended to foster) (emphasis added). A second constitutional source of fair use is the First Amendment. Making fair use of another author's work is often necessary to engage in critical commentary, news reporting, and other free speech-related activities that serve First Amendment goals. See, e.g., *Campbell v. Acuff-Rose Music, Inc.* 114 S.Ct. 1164 (1994) (fair use parody as a form of critical commentary); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (fair use to reproduce portions of article in critical biography of Howard Hughes); *Hustler Magazine, Inc. v. Moral Majority*,

Inc., 796 F. 2d 1148 (9th Cir. 1986) (fair use to reproduce parody of Jerry Falwell in protest mailing about the parody); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (fair use to parody popular song in humor magazine); Triangle Pub., Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980) (fair use to reproduce cover of TV Guide in comparison of competing guide); Italian Book Corp. v. American Broadcasting Co., 458 S. Supp. 65 (S.D.N.Y. 1978) (newsworthy broadcast of street festival allowed fair use of music); Keep Thomson Governor Committee v. Citizens for Gallen Committee, 457 F. Supp. 957 (D. N.H. 1978) (fair use to reuse portions of political song in political commentary); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (fair use to reproduce frames of Zapruder film in order to explain author's theory of Kennedy assassination).

As the District Court below observed, fair use has been viewed by the courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment. Universal City Studios, Inc. v. Corley, 111 F.Supp.2d 294, 321 (S.D.N.Y. 2000). Various Supreme Court and Court of Appeals decisions confirm this. See, e.g., Harper & Row v. Nation Enterprises, Inc. 471 U.S. 539 (1985) (recognizing the constitutional importance of fair use in mediating between copyright and the First Amendment interests, although ruling against a news magazine had not made fair use in publishing key excerpts of a forthcoming memoir); Nihon Keizai Shimbun v. Comline Business Data, 166 F.3d 65, 74 (2d Cir. 1999) (First Amendment concerns are protected by fair use). Without fair use or a similar limiting principle in copyright law, this law would frequently clash with the First Amendment. See, e.g., Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970); Yochai Benkler, Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354 (1999).

It has generally been unnecessary for courts to rely explicitly on the constitutional basis for fair use because of its longstanding doctrinal home in American copyright law. See, e.g., [older cases]. When Congress finally codified fair use in the Copyright Act of 1976, it identified several categories of favored uses, i.e., for criticism, comment, news reporting, teaching&, scholarship, [and] research, all of which are free speech-related uses of copyrighted works. When codifying fair use, Congress made clear that the newly adopted fair use provision was meant to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way. See H.R. Rep. No. 94-1476, p. 66 (1976); S. Rep. No. 94-473, p. 62 (1975). The legislative history also evidences that Congress did not intend to freeze the concept of fair use and expected that courts would continue to evolve fair use principles in the course of common law adjudications, especially during a period of rapid technological change, as they had done for many decades. Id.

As anticipated, courts have frequently invoked fair use to mediate tensions between interests of copyright owners and subsequent users of copyrighted works in cases involving new technologies that posed challenging questions for copyright law. See, e.g., Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. (1984) (time-shift copying of television programs held fair use); Sega

Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (fair use to reverse engineer computer program code for legitimate purpose of getting access to information necessary to make a compatible program, furthering constitutional purposes of copyright); Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. 964 F.2d 965 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993)(fair use for users to employ tool to alter game displays). See also, e.g., RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)(space-shift copying of music also fair use).

The most prominent role of fair use has lain in the central core of the concentric circles of copyright liability set forth above, that is, as a limitation on the exclusive rights of copyright owners when they have claimed direct infringement by a defendant. But fair use is also a crucial defense in indirect liability cases. One proper defense in a case involving claims of contributory infringement or vicarious liability is that the underlying acts which the defendant facilitated or could have controlled are, in fact, fair uses. See, e.g., Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992) (ruling, in part, that Galoob was not contributorily liable for copyright infringement because users of Galoob's game genie were fair users). Fair uses are, moreover, among the noninfringing uses of a technology that may be deemed substantial so as to limit the power of copyright owners to impose indirect liability on the manufacture and sale of an infringement-enabling technology. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (movie studios failed to establish contributory infringement liability by Sony because Betamax machines had substantial noninfringing uses, including the enablement of fair use copies of television programs for later viewing). Indeed, free speech concerns are perhaps greater in the indirect liability context because third parties are even more likely to be chilled by the possibility of liability than direct users of copyrighted material. [cite to article re ISP liability]

II. As Interpreted by the District Court, the Anti-Circumvention and Anti-Trafficking Provisions of the DMCA Fail the Careful Scrutiny Required of Statutes That Infringe Protected Speech.

A. To Survive Constitutional Scrutiny, the Anti-Circumvention and Anti-Trafficking Provisions Must Contain a Fair Use or Free Speech Defense.

As explained above, the anti-circumvention and anti-trafficking provisions of the DMCA expand indirect liability to create a new third and fourth ring of persons liable to copyright holders. The provisions give the force of law to encryption technology that prevents unauthorized access to copyrighted works -- regardless of whether a user has a fair use right to access the work. The constitutional interests embodied in fair use, however, do not evaporate merely because a copyright owner uses technological wrappers to protect copies of its works. Just as Congress could not repeal the fair use provision of U.S. copyright law without creating serious conflicts with the First Amendment, it cannot accomplish the same result indirectly by banning all technologies through which fair uses can be made. Thus, as the case law discussed above makes clear, in order to pass constitutional muster, the DMCA provisions must,

at the very least, be narrowly tailored through recognition of a fair use or fair-use like defense. [\[x\]](#)

There is reason to think that, properly interpreted, Congress left some latitude for fair uses in the anti-circumvention provision. Section 1201(a)(1)(A) is limited in scope by seven specific limitations that privilege circumvention of access controls for, among other things, reverse engineering, encryption research, and computer security testing. [\[xi\]](#) 17 U.S.C. sec. 1201 (f), (g), and (j). But as the National Academy of Sciences recently concluded, there may be more legitimate reasons for circumventing technical measures used by copyright owners to protect their works than is explicitly provided for in section 1201. See *The Digital Dilemma: Intellectual Property in the Information Age*, at 174-75; see also Appendix G for other criticisms of section 1201 [???]. Congress left a potential loophole to safeguard additional protected uses in Sections 1201(c)(1) and (c)(4). Section 1201(c)(1) provides that nothing "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." In addition, Section 1201(c)(4) provides that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products." *Amici* believe that courts can and should employ these subsections to excuse some acts of circumvention seemingly covered by 1201(a)(1)(A) where necessary to enable fair uses or other free speech-related uses of copyrighted works. For example, a purchaser of a mass-marketed copy of a DVD movie may need to bypass CSS in order to make fair use of that copy in the course of preparing a critical commentary about it. Even the district court acknowledged that the range of potential fair uses of DVD movies was remarkably varied, 111 F.Supp.2d at 338, and opined that technically sophisticated persons would be able to make fair uses of DVD movies, *id.* at 322 (presumably by circumventing CSS by writing an equivalent program to DeCSS, although a strict interpretation of section 1201 would forbid this).

Yet the district court specifically held that there was no fair use defense to the anti-trafficking provisions. *Amici* agree that the anti-trafficking provisions are more difficult to reconcile with constitutionally protected fair use and free speech interests. Only three of the seven specific exceptions to 1201(a)(1)(A) explicitly authorize the making of a tool to accomplish privileged circumventions. If interpreted literally, that means that while users may have a right to circumvent for specific purposes, they will be unable to exercise that right. There will be no tools available to assist them in circumvention because the anti-trafficking provisions make those tools illegal. Did Congress intend to create four meaningless privileges? In addition, unlike the anti-circumvention provisions, Congress failed to include a rulemaking procedure to ensure that the anti-trafficking provisions do not interfere with fair uses or other noninfringing uses of copyrighted works. Contrary to the district court's holding, however, *amici* believe that this Court can read 1201(c)(1) and (c)(4) as limitations to ensure that the anti-trafficking provisions also comply with the First Amendment. If the Court concludes that the statutory provisions provide no free speech defenses to anti-trafficking, then *amici* believe that the Constitution requires the Court to read such a defense into the statute.

In this case, it is clear that there are many legitimate expressive

free-speech-related uses of DeCSS that must be protected under 1201(c) or the Constitution. Carnegie Mellon Professor Touretsky posted different modes of expression of DeCSS for educational purposes. Columbia Law School Professor Jane Ginsburg linked to sites where DeCSS was posted in the course of teaching her copyright course. Protesters wore T-shirts bearing portions of the DeCSS source code, and appellant Corley is a journalist that used DeCSS in his newspaper coverage.

To apply a fair use or free speech defense to the anti-trafficking provision does not leave copyright holders without a remedy for the manufacture and distribution of technologies that lack legitimate uses. See, e.g., *Sony of Am. v. Universal City Studios*, 464 U.S. 417 (1984). It merely requires that copyright holders prove that circumvention technology is incapable of substantial noninfringing uses before a court may impose liability for trafficking in it. Courts in past cases have been able to distinguish between genuine and pretextual claims of substantial noninfringing uses. See, e.g., *Sega v. MAPHIA*.

B. To Survive Constitutional Scrutiny, the Anti-Trafficking Provision Must Also Require Proof of Harm and a Direct Relationship Between the Infringer and the Defendant.

To be narrowly tailored, the third and fourth rings of liability imposed by the DMCA -- for circumvention of access controls and trafficking in circumvention technology -- must also include the traditional safeguards recognized by courts before imposing any indirect liability for copyright infringement: 1) proof of infringement, and 2) some direct relationship between the infringer and the defendant. To explain why, we begin with a review of the doctrine of indirect liability for copyright infringement. The federal copyright statute includes no provision providing for liability based on the acts of another. Rather, indirect liability for copyright infringement is a judge-made doctrine. Courts have traditionally recognized two forms, vicarious liability and contributory liability.

Vicarious liability for copyright infringement has its roots in the tort doctrine of *respondeat superior*. [cite to law review articles] If infringement occurred, and a third-party defendant had the right and ability to supervise the infringer and a direct financial interest in the infringement, liability may be imposed. Nimmer on Copyright, Sec. 12.04[A][1]; see *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1964) (holding department store vicariously liable for copyright infringement of record sales concessionaire); *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162-63 (2d Cir. 1971) (holding manager liable for infringing performances by musician).

The separate but related doctrine of contributory infringement is an outgrowth of enterprise liability. Nimmer on Copyright, Sec. 12.04[A][2]; [cite to law review articles]. Under contributory infringement rules, a third party is liable only if 1) an infringement actually occurred; 2) the third party had knowledge of the infringement; 3) the third party "induced, caused or materially contributed" to it; and 4) the defendant "substantially participated in the users infringement" (which has been interpreted as requiring that the defendant was

"acting in concert" with the direct infringers). Nimmer 12-73; see *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293 (S.D.N.Y. 1988).

Though the specific tests vary somewhat, both forms of indirect liability require proof of two essential elements (in addition to allowing a fair use defense) before liability may be imposed on a defendant who did not directly infringe a copyright: 1) actual infringement; and 2) a direct relationship between the infringer and the third party. Any indirect liability for copyright infringement has the potential to chill protected speech, because third parties are likely to avoid any connection with even potentially infringing material in order to avoid liability. [cite to law review article about third party liability for ISPs]. But requiring proof of harm and a direct relationship between the infringer and the third party helps to minimize the unnecessary chilling of speech, and thus ensures that liability is narrowly tailored.

The anti-circumvention and anti-trafficking provisions of the DMCA lack these necessary safeguards for imposing indirect liability. It is a telling fact that appellees were unable to identify a single instance of infringement brought about by DeCSS notwithstanding the presence of hundreds, if not thousands, of copies of this program on publicly accessible websites, even after it was taken down from appellant Corley's site. Nor did they show that Corley was either supervising actual infringers or acting in concert with them. Especially since trafficking in circumvention technology represents an entirely new category of indirect liability, these additional elements of proof ensure that the provision is narrowly tailored as required by the First Amendment. To impose liability for trafficking on appellant Corley consistent with the Constitution, then, the Court should remand to the district court for additional fact-finding to determine whether appellees can prove infringement and a direct relationship between appellant and that infringement; if so, as discussed above, the court must also consider whether appellant is nevertheless entitled to a fair use or free speech defense.

C. If Section 1201(a)(2) Lacks the Constitutional Safeguards Outlined Above, It Must Be Voided On Its Face.

If this Court finds that the anti-trafficking provision is incapable of the narrowing construction outlined above, it must be voided on its face. [CITE narrowing construction cases] Without free speech safeguards the expansion of indirect liability into a fourth ring of liability for trafficking in circumvention technology restricts beyond constitutional limits speech that was clearly in the public domain and protected by the First Amendment prior to the DMCA. See Benkler at ___; Nimmer at 739 (noting the "conscious contraction of user rights" by Congress). As interpreted by the district court, the anti-trafficking provision operates as an effective ban on a variety of expressive technologies capable of substantial noninfringing uses. Unless narrowly construed, such an effective ban on protected speech violates the First Amendment. See *Reno v. ACLU* (striking down Communications Decency Act because it operated as an effective ban on speech protected for adults). DeCSS is, of course, only one

of countless technologies covered by the statute. [INSERT OTHER EXAMPLES?] In addition, the district court's interpretation has had and will continue to have a substantial chilling effect on the development of new technologies capable of important noninfringing uses. See, e.g., Matt Richtel, Web Music Battle Heats Up, *New York Times*, Aug. 22, 2000, at C-6 (reporting declaratory relief action filed to determine lawfulness of Gnutella file-sharing software); Damien Cave, A Hacker Crackdown?, *Salon Magazine*, at http://salon.com/tech/feature/2000/08/07/yoink_napster/print.html (Aug 7, 2000) ("There is evidence that the mere threat of legal hassles is convincing some programmers to lay off their grand plans."); [CITE to articles specifically about DeCSS??.]

III. The District Court's Injunction Prohibiting the Use of Links to Web Sites with Circumvention Technology Violates the First Amendment.

A. Linking is Expressive, Communicative Activity Protected By the First Amendment.

The web is analogous to a vast library including millions of readily available and indexed publications. *ACLU v. Reno*, 521 U.S. 844, 853 (1997). The unique quality of this library comes from the boundless volumes of information available on the Internet. Never before have individuals so easily been able to publish information. *ACLU v. Reno* (*Reno I*), 521 U.S. 844, 853 (1997) (Any person or organization with a computer connected to the Internet can publish information.). Never before has it been so simple to reach a world-wide audience of millions of readers, viewers, researchers, and buyers. *Reno v. ACLU* (*Reno I*), 521 U.S. 844, 853 (1997). The Supreme Court recognized and praised this vast democratic fora of the Internet. *Reno I* at 868-69.

If the web is a vast library, links serve as both its card catalog and its digital footnotes. Web publishers use links to refer users to related documents. A link in a web page allows the user to move from one web site to another that contains the related document by clicking on specified text or graphics on the web page using a computer mouse. Rather than requiring a reader to go to a library or bookstore to locate the referenced document, a link allows a web user to click on the link to access the related document wherever in the world it is located. Linking effectively ties the entire web together into a single interconnected body of knowledge made up of all the individually published web pages of millions of different users around the world. The ability to link from one computer to another, from one document to another across the Internet regardless of its status or physical location, is what makes the Web unique. *ACLU v. Reno* (*Reno II*), 31 F.Supp.2d 473, 483 (E.D.Pa. 1999) aff'd 217 F.3d 162 (3d Cir. 2000).

Journalists routinely use links to refer users to information posted on other websites in the course of covering stories on controversial subjects of public importance. Educators also provide links to information posted on other websites for purely pedagogical reasons. To aid her law students in understanding the controversy over DeCSS, for example, Professor Jane Ginsburg has linked to sites where DeCSS can be found. Professors Jessica Litman and Pam Samuelson have also routinely hosted links to many sites,

including cites with DeCSS code, in the teaching of their classes. Similarly, Harvard University recently boasted a link to a homepage with DeCSS code.

The uniqueness of links arises not, as the district court suggests, from their "functionality." Links are no more "functional" than a dewey decimal citation. The reader decides whether to follow the link. The creator of the link has no control over the content on linked site, or over whether the reader decides to follow the link. Rather, the uniqueness of links arise from the efficiency with which they allows users, *if they choose*, to locate and retrieve related documents. Thus, links are clearly expression entitled to the highest degree of First Amendment protection.

B. The District Court Erred By Interpreting the Anti-Trafficking Provision To Prohibit Mere Links to Circumvention Technology.

Section 1201(a)(2) provides that [n]o person shall & offer to the public, provide, or otherwise traffic in any circumvention technology. The district court found that this provision "is implicated where one presents, holds out, or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it. 111 F.Supp. 2d 325. The court further found that maintaining a link to a web page containing the DeCSS code is the functional equivalent of transferring the DeCSS code to the user&. Id. The court then enjoined the defendants not just from directly distributing DeCSS to the public, but also from linking to other sites that did. Because linking to a site containing DeCSS is the functional equivalent of directly presenting or making DeCSS available to the user, the court reasoned, linking to a DeCSS site violates the DMCA anti-trafficking provision.

But the functional equivalent of something is not the thing itself. As discussed above, Section 1201(a)(2) already reflects a dramatic extension of liability beyond the behavior sought to be prevented: copyright infringement. The court below, by imposing liability for linking to circumvention technologies, has created an additional fifth ring of indirect liability. The text of the anti-trafficking provision should be interpreted cautiously, with attention to both the words of the text and the evidence of congressional intent, to avoid further encroachment on protected speech. Certainly, the language of the statute does not require the expansive reading that the district court gave to it. Significantly, moreover, the legislative history of Section 1201(a)(2) and (b)(1) contains no hint that Congress intended it the provision to extend to links. And Congress had ample opportunity to demonstrate this intent: the Senate Judiciary, House Judiciary, and House Commerce Committees all issued lengthy reports on the DMCA, as did the Conference Committee and Congressman Howard Coble, the Chairman of the House Judiciary Subcommittee on Courts and Intellectual Property and the manager of the DMCA. In none of these detailed documents is there even a suggestion that Section 1201(a)(2) s trafficking provision should apply to links to circumvention technology.

In sum, there is no evidence that Congress intended to construct a fifth ring of liability for links, nor is there any evidence that a breach of the other four rings is so imminent as to require a further expansion of liability. In the absence of such evidence, there is no compelling justification for the court below s

expansive interpretation of trafficking to include linking to a DeCSS site. Indeed, as discussed below, this expansive interpretation steers the decision onto thin ice constitutionally. These hazards can be avoided altogether by interpreting the trafficking provision literally, without applying it to functional equivalents.

C. Imposing Liability for Mere Links to Circumvention Technology Violates the First Amendment.

The district court's extension of the anti-trafficking statute to impose liability for merely providing links to sites containing circumvention technology violates the First Amendment. Mere links between sites do not establish a relationship sufficient for imposing either vicarious or contributory liability when a link references a site with circumvention technology. See discussion *supra* at _____. In the vast majority of instances, there is no relationship whatsoever between sites connected through links. There is no ability for a linker to supervise or control content on the linked site. Neither do web sites connected through links "act in concert" any more than the authors of this brief "act in concert" with Nimmer by including a reference to his work. In addition, even if the third and fourth rings of expanded liability for circumvention and trafficking are constitutional, which is far from clear, to weaken the causal link between infringement and liability even further would clearly impose liability beyond constitutional limits.

Although the district court recognized that liability for links was constitutionally suspect, the court's analysis ignored both established indirect liability doctrine and the need to accommodate free speech concerns. Rather than requiring proof of harm and a direct relationship between the defendant and an infringer, the district court imposed liability on anyone who links to circumvention technology with knowledge and for the purpose of disseminating the technology. [xii] The knowledge and intent requirements in this heightened standard fail to resolve the constitutional problems inherent in imposing liability for links. For example, any journalist or academic who links to a site where DeCSS is posted as part of news coverage about the controversy is likely to a) know that DeCSS is located at that site, b) know that certain motion picture studios consider it illegal and that Judge Kaplan has ruled that it is illegal, and c) create the link with the intent of enabling readers to understand the controversy which will inevitably result in the dissemination of the program to some degree. [xiii]

The chilling effect of the district court's ruling has already begun, and has extended beyond simply linking to DeCSS. Prior to the ruling, The New York Times, CNN, the Village Voice, CNET and many other news publications all linked to sites containing DeCSS as part of their coverage of this case. Many of those organizations have now removed their links. Few news organizations will find the distinction between linking for the purpose of disseminating a technology and linking for other purposes to be sufficiently clear to be sure the organization would be safe if it published a link to a program such as DeCSS. Some copyright professors have also removed their links to DeCSS for fear of liability. [EXAMPLES?]

Assuming that the Court overcomes other constitutional problems with the anti-trafficking provision, amici believe that third-party liability for trafficking could be imposed in some narrow circumstances. If plaintiffs could prove that a defendant had "the right and ability to supervise" and a "direct financial interest" in the manufacture or offering by another of circumvention technology that had actually infringed their copyrights, then vicarious liability may be appropriate. While links would never create a per se violation under this theory, links might be relevant evidence in establishing the ability to supervise and financial interest. For example, a parent software development company could have a web site advertising its services, and could promote its software developers by offering a link to a developer's site that contains circumvention technology. Similarly, if the creator of a web site was the agent of an illegal trafficker to whom the web site linked, the linker could be liable. But *amici* emphasize that the existence of a link alone would never be sufficient proof for establishing indirect liability. Unlike the district court's test, imposing indirect liability for trafficking only where vicarious liability or agency is established provides the balance necessary under the First Amendment to prevent unnecessary chilling of protected speech.

Conclusion

In summary, to remedy the constitutional defects in the district court's opinion and order, *amici* urge this Court to:

- 1) interpret 1201(a)(2) to require a fair use or free speech defense, proof of infringement, and a direct relationship between the infringer and the defendant;
- 2) reverse the district court's ruling and remand with instructions to consider whether defendant may be held liable under the interpretation of 1201(a)(2) outlined in #1 above;
- 3) in the alternative, should the court hold that the statute does not permit the interpretation outlined in #1 above, the court should rule that 1201(a)(2) is unconstitutional on its face; and
- 4) reverse the district court's ruling that 1201(a)(2) may be applied to prohibit mere links to sites containing circumvention technology.

End Notes

[\[i\]](#) See generally Melville B. Nimmer, Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?, 17 UCLA L. Rev. 1180 (1970); Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970).

[\[ii\]](#) Yochai Benkler, Free As The Air To Common Use: First Amendment Constraints on Enclosure of the Public Domain; 74 N.Y.U.L. Rev. 354, 386-89

(1999); James Boyle, A Politics of Intellectual Property: Environmentalism for the Net?, 47 Duke L.J. 87, 89 (1997).

[iii] Benkler, supra note ___, at 358.

[iv] 17 U.S.C. § 106.

[v] 17 U.S.C. §1201(a)(1)(A) [QUOTE STATUTE].

[vi] 17 U.S.C. §1201(a)(2) and §1201(b)(1) [QUOTE STATUTE].

[vii] Benkler, supra note ___, at 393 ("An increase in the amount of material one owns decreases the communicative components freely available to all others.").

[viii] This is far from clear. [CITE to articles, other briefs]

[ix] The district court applied intermediate scrutiny based on the "functional" component of the speech covered by the anti-trafficking provision. Amici agree with appellants that the level of scrutiny applied to protected speech should not, and has never previously been, determined by the functionality of the speech. Amici believe, however, that even under intermediate scrutiny the anti-trafficking provision, as interpreted by the district court, would violate the First Amendment, because of the complete lack of fit between any actual harm and the breadth of the speech restriction.

[x] It is somewhat confusing to discuss a "fair use" defense for a defendant in an anti-trafficking action, which imposes liability not for "use" but for manufacturing or offering circumvention technology. Although the issue is not entirely clear in the case law, in an indirect liability case the question is normally whether the direct infringer had a fair use defense. [CITE cases; law review article] In the context of liability for trafficking, amici assert that the necessary free speech defense must be tied to the potential uses of the technology rather than to the behavior of the trafficker. If the technology is capable of substantial noninfringing uses, then the defendant -- whether or not she is also a fair user -- is entitled to a fair use or free speech defense. See Sony.

[xi] In addition, Section 1201(a)(1)(A) does not outlaw the bypassing of an anti-copying control whether for fair use or other purposes. See, e.g., David Nimmer, A Riff on Fair Use, 148 U. Penn. L. Rev. xx, yy (1999). It only outlaws the circumvention of access controls.

[xii] While the district court purports to rely on the free speech balancing created by the "actual malice" in the defamation context, in fact his test is nowhere near as protective of speech. Under the actual malice rule, most false statements will go unpunished because plaintiffs cannot prove they were said with malicious intent. The district court's linking test would punish speech intended to disseminate technology *regardless of whether the technology has actually been found to facilitate illegal copying*. See also Journalists' Amicus Brief.

[\[xiii\]](#) Kaplan's standard also poses serious dangers of unconstitutionally discriminatory enforcement. As the Corley case itself illustrates, those who are at most risk of being found to violate section 1201 are those of whom the judge disapproves because of their unpopular views or activities. It is evident, for example, that the trial judge's strong disapproval of Eric Corley and the 2600 Magazine had a bearing on the judge's interpretation of the implications of 1201(a)(2) for them.

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Editors Note: This is a comprehensive review of copyright issues. We are including it in this issue for two reasons: 1. It is a sound, thoughtful article, and 2. The co-authors have never met face-to-face. This research paper was collaboratively written for an online class conducted by Dr. William Lynch at George Washington University called, "Critical Issues in Distance Education." (see URL: <http://www.gwu.edu/~etl>. It is certainly one answer to the distance learning question, "Quo Vadis?", "Ergo Sumus", we are here!

Survey of Intellectual Property Issues for Distance Learning and Online Educators

L. Heidi Primo (Hawaii) and Teresa Lesage (Alaska)

"Crime in a Poet, Sirs, to steal a Thought ?

No, that 'tis not; if it be good for aught:

'Tis lawful Theft; 'tis laudable to boot;

'tis want of Genius if he does not do't:

The fool admires--the Man of Sense alone

Lights on a Happy Thought--and Makes it all his own."

--John Byrom, Miscellaneous Poems, 1, 133(1773)

quoted in George J. Buelow, "The Case for Handel's Borrowings: The Judgement of Three Centuries", and in Stanley Sadie and Anthony Hicks, Eds., Handel Tercentenary Collection, Macmillan Press, Houndmills, 1987.

Intellectual Property Defined

Intellectual Property is the original product of our own experiences and thoughts. How can we put a price-tag on it? How can we market it, license it, box it and put it on a shelf? Whenever we share an idea, turn in a paper, or publish a work we are exposing our thoughts not only to criticism, but also to theft. The United States Government, as well as foreign governments and the World Intellectual Property Organization (WIPO), in order to protect intellectual property and to facilitate the free flow of thoughts without fear of pecuniary loss, has attempted to define the barely tangible, the original thought.

One of the rationales for the existence of copyright law is to encourage and promote creativity, which ultimately can only benefit society. The protection of the law acts an

incentive to artists and publishers to invest time and money in artistic enterprises. However, in many cases there exists a tension between the need to protect the interests of the creator and the promotion of new art and new forms of artistic expression. Few would argue that the wholesale copying of other people's work should be permissible, particularly if it would be possible to obtain a license on payment of a reasonable fee. Although current trends in electronic media could not have been foreseen a century ago, writers in the American Bicentennial year were concerned with protecting intellectual property in all forms and so created a remarkably plastic definition of intellectual property. Section 102 (a) of the 1976 U.S. Copyright Act reads:

"Copyright protection subsists in 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." (Brunwelheide, 1995).

According to this definition, then, every part of an American Distance Learning application would be logically protected under U.S. law. So then, would the resources, documents, readings and contributions, which make up the classes. Therein lies the rub. Negotiations are in place to alter some of the laws that apply to analog "Fair Use and Performance Rights" for Distance Learning. If a United States organization creates electronic distance learning materials for limited use within a non-profit educational institution or training organization, current reliance on "fair use" is appropriate. On the other hand, for commercial products or online courses, "fair use" will not normally be protected or upheld by the courts.

The law is unclear, and the U.S. Copyright Office is recommending changes to some aspects of the Copyright Law to accommodate Digital Distance Learning. Rights to transmit materials for distance learning differ from rights to use materials in face-to-face teaching, depending on the medium of expression.

New Challenges to Copyright Issues for Distance Learning

With the explosion in the use of distance education, the amount of information and the degree of public access to it has grown exponentially. Increasing numbers of distance learning courses, especially on the Internet are redefining the boundaries of intellectual property. While course syllabi and materials were once carefully guarded and protected by their creators, putting some of these materials on the Internet for student access has made protection a near impossibility.

"Copyright Act (DMCA), the U.S. Copyright Office As required by Section 403 of the Digital Millennium conducted a study on how to promote distance learning through digital technologies while maintaining the "owners and the needs of the users of copyrighted appropriate balance between the rights of the copyright works." (Educause, 1999)

Recommendations for consideration by the U.S. Congress were submitted on or before April 28, 1999. As yet, no legislation has been enacted. The U.S. Copyright Office has the compiled 353 page document on Report on Copyright and Digital Distance Learning, which is available in Adobe Acrobat format at their website.

Categories of Protected Works

Copyright protection is available for the following categories of works that may be of interest to instructional designers, distance educators and multimedia developers. Literary works includes novels, nonfiction prose, poetry, newspaper articles, magazine articles, computer software, software manuals, training manuals, catalogs, brochures, text ads, and compilations. Musical and dramatic works, pantomimes and choreographic works (dance) are also protected. Images that are protected include pictures, graphics and sculptural works, including photographs, posters, drawings, paintings, cartoon strips and characters, stuffed animals, statues, and any other works of art. Motion pictures and other audiovisual works including documentaries, travelogues, training films and videos, television shows, television ads, and interactive multimedia works are protected. So are sound recordings of music or words. Copying and distribution of copyrighted material without permission can be illegal, even if you do not charge for the copied material. Making copyrighted material available to others can be "contributory infringement."

Course Designer Ownership

Faculty members are now concerned with the protection of their own creative works including the teacher's syllabus, lectures, examinations and other course materials, whether they are newly created or adapted from existing classes for distance delivery. Potential disputes arise around intellectual property issues specifying who owns the course- the faculty members who developed it or the institution that paid them to create it. Generally, the owner(s) of a copyright is the person (or persons) who created the work. In some institutions, the administration allows faculty members to retain ownership of all courses they create as individuals. Courses that are created within the scope of employment, using substantial institutional resources, or as part of "work-for-hire" arrangements often remain the property of the institution, whether or not there was mutual intent to become co-owners. For courses that fall in-between, the percentage of ownership must be negotiated or contracted, in advance. In order to qualify the work as a "specially commissioned" work-for-hire, there must be a written agreement in place prior to commencement of development of the new product or course.

Multimedia Considerations

Digital technology makes it fairly effortless to combine the work of others. The developer of multimedia creations that incorporate a number of preexisting works by others (i.e. photographs, film clips, text, music) is still under obligation to obtain permission from the copyright holders or the artists who created those original works. Anyone who violates the exclusive rights of any copyright owner is an infringer and could be liable to pay monetary damages. (Brinson & Radcliffe, 1996).

The Role of Online Instructors

Once courses have been posted to the Web, what becomes the role of the faculty member? Some financially strapped institutions look to one-time creation of classes as a way to maximize profits while minimizing costs. To avoid confusion, the right of use,

the right of reimbursement for the contribution, and the right to share in proceeds should be negotiated before a course is created, to avoid costly and lengthy litigation afterwards.

Conflicts of Interest

Professors & faculty members teaching or providing online courses for other institutions than their employer create a potential conflict of interest, particularly if this course substantially competes with one their employer offers. In addition, there are questions as to whether the person can mention their affiliation with a University if the course is taught elsewhere. Conflicts also arise when extracurricular projects interfere with time spent or designated duties required by the faculty member's home institution. This is not a new controversy in Academia that is exclusive to Distance Learning, but potential for conflict exists.

Videotaped Classes

If a faculty member designs an audiovisual course, writes the outline, then "stars" in the video format of the class, should the instructor be entitled to royalties or residual profits resulting from the resale of the course content through time? In the concept of "mediated instruction," performance and display is analogous to the type of performance or display that would take place in a live face-to-face (F2F) classroom. Section 110 (1) allows performance rights for transmissions regardless of the medium used in F2F teaching; Section 110 (2) authorizes transmissions of still images and performance of non-dramatic literary works and music to distant learners (University of Texas System). A teacher's course should never be recorded without their explicit knowledge or permission. Recordings of courses are academic documents and thus considered works of scholarship. Therefore, the author or creator should retain proprietary rights (American Association of University Professors, 2000).

Liability for Copyright Infringement

Courses to be used in Distance Learning that include materials from archives and special collections, found on the Internet, images that are digitized from analog sources, or content created by merging different kinds of works into multimedia creations all need to avoid copyright infringement. Copyright protects any works of authorship fixed in a tangible medium of expression. It protects a person's unique way of expressing something, even if it only utilizes a minimum amount of creativity. It does not protect underlying ideas or facts. Unauthorized users and their sponsoring institutions share legal liability.

Registration & Length of Copyright

In the United States, for works created during or after 1978, copyright protection begins as soon as a work is "fixed in a tangible medium of expression" and ends 70 years after the death of an author. Protection is automatic and copyright notice is not required, however the benefit of registration follows an author wishes to bring suit, in which case statutory damages and attorney's fees can be awarded by a court. {Works published before 1978 maintain their copyright for 95 years after publication. If

published before 1964, the copyright remains for 28 years, plus another 67 years, if renewed.}

Rights of Copyright Owners

Owners have exclusive rights to make copies, to create derivative modifications of their work, to distribute, display or perform works publicly. For works that are protected, permission must be obtained from the copyright owner to use their work in a distance learning or multimedia work. There are certain exemptions to this law, such as "fair use."

Fair Use

The boundaries of "fair use" (section 107) are not transparent or fixed, and exemptions for instructional broadcasting have been recommended to the U.S. Congress. The doctrine of fair use developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain, limited circumstances. This doctrine has at its core a fundamental belief that not all copying should be banned, particularly in socially important. Special exemptions for legitimate educational activities and learning uses previously existed for teachers and students to make a small number of copies (de minimus copying) of printed materials. Research, criticism, commentary, news reporting, teaching, scholarship and all fall within the traditional boundaries of "fair use." The trend in recent court decisions is towards narrowing the scope of "fair use." (Univ. of Texas System website). (Bitlaw website)

The challenge is to determine how much of this law extends to digital technologies, audiovisual aids and new communications media. By its very nature, a digital transmission implies making a copy, at least at the point where it is received. There is no consensus on guideline status of creation of multimedia works or educational use of digital images and text for distance learning. The Association of American Publishers strongly opposes a "blanket exemption" which could allow works to be exhibited or transmitted on the Internet, rationalizing that existing copyright law provides sufficient protection, and "any substantial changes to copyright law are unnecessary." Copyright owners and providers are concerned that if an exemption is allowed for digital distance learning, it will result in unlimited, unauthorized dissemination of duplicate copies of copyrighted materials over the Internet. Whether or not digital licensing will provide a viable remedy is undetermined, as yet. (Educause, 1999).

Commercial Use

The rights of "fair use" extend to faculty and students for educational "non-profit" activities. If a work is sold to the public for entertainment purposes or commercial gain, the courts do not generally consider this "fair use." This brings up issues about using materials for classes or courses where students are charged tuition. If a web site uses or disseminates copyrighted material, whether or not people are charged to view it, license from the owner must be obtained. If "fair use" does not apply, always seek permission to use content.

Moral Rights

In British law, two additional rights are granted to authors of visual works: the right of attribution, and the right of integrity. The right of attribution, or identification, sometimes referred to in international treaty contexts as the 'right of paternity,' allows an author to prevent misattribution of a work. It gives authors the right to a credit or by-line, or to none if they choose if they mandate that the authorship of the work not be disclosed (i.e. it should remain anonymous). The right of integrity bars intentional distortion, mutilation, or other modification of a work if that distortion is likely to harm the author's reputation, and prevents the destruction of any work of recognized stature. It allows the author or artist to object to any derogatory treatment (Holderness, 1998).

Measures to Control Unauthorized Use

Safeguards like digital licensing and technological remedies such as encryption and digital watermarks exist. Digital Object Identifiers (DOI) can track copyrighted materials. Sometimes an author password protects access to material. Other technologies that hinder unauthorized copying online or off are in various states of research and development. Intentional circumvention of technological measures to control unauthorized access to a work is prohibited under the DMCA. It is also illegal to manufacture or distribute a technology that would gain the means to defeat technological measures to protect the rights of owners (Band, 1998).

Electronic copyright management systems are basically databases containing information about the content of products and works that conceivably could be used to authorize the use of these works by others. This could be managed by a third party or an international agency (presumably, for payment). As yet, no global system exists for collective administration to clear content of transmitted or digital copyrighted works. To be viable, it would need to take into account both national laws and internationally negotiated treaty. A universally acceptable system would also need to negotiate which country's protection laws take precedence, the place where something is electronically transmitted or where it is received.

Licensing agreements determine the terms of use, and entail the power to deny access to information. Licensing has not worked, thus far, for distance education. Current licensing methodologies are not sufficient to allow students the ability to use copyrighted works for educational purposes. Obtaining permission means delays and often the costs to use licensed materials are prohibitive. Perhaps a well-designed system of making "micro-payments" to authors or artists could be implemented, but it would be difficult to enforce. This also could put undue financial burden on content providers or students who rely on the Internet, and could exasperate the "digital divide" between the richest and the poorest students.

Public Domain Materials

Much material that is on the Internet is in "the public domain," meaning people are free to copy or use it since the copyright owner's exclusive rights expired. It is a myth to believe that anything people put on a Web server is in the public domain just because it is made available. As simple as it is to do, people are not free to copy from the Internet without getting permission.

Patents, Trademarks and Trade Secrets

Design patents for inventions and processes that are electrical, mechanical or chemical in nature should be registered with the U.S. Patent Office. This is necessary to gain protection, or to exclude others from duplicating the idea and commercially marketing it. The invention must meet the requirements of novelty, utility and there must be nothing in any printed publication in the world that describes this invention. Unlike copyright law, this is no automatic protection. This could apply to Distance Education if staff members develop an original software program for manipulating images.

Trademarks are devices used in commerce to identify business goods or services, and are protected if they are filed and registered. Logos, images, symbols and even words (slogans) can all be considered trademarks. Trade secrets include valuable information that is not generally known to the public, and can only be protected under state laws. (Brinson and Radcliffe,1996).

Network Servers & Online Service Providers

The institution providing distance learning is responsible for the technological delivery or conveyance of courses. Liability to the network server that provides Internet or intra-net access for copyright infringement that occurs during the course of providing remote instruction has also come into question. At this point, the Online Service Provider (OSP) is not liable if they take down the infringing material after the copyright owner orders them to "cease and desist" transmission. The network server or OSP is not responsible for content placed online.

Electronic Lists (Listservs) and Discussions

It is not allowable to include quotes or citations of another author's works within a posting to an electronic bulletin board or discussion group without obtaining express permission.

Administrative & Institutional Policies

Established policies that anticipate any potential problems that might occur with the creation of online courses or distance learning should be in place before an institution's faculty develops distance education programs. This will not only enable faculty to feel confident in sharing their intellectual property through distance learning media, but will assure administrators that what the professors do won't hurt the institution. Institutions must have reasonable assurances that their staff and faculty will avoid unlawful uses of copyrighted works. Written policies protect an institution from liability if a genuine effort has been made to educate and increase awareness about intellectual property issues. The institution should facilitate access to legal measures to gain licenses and copyright permission. There also needs to be criteria for establishing ownership, future use and distribution rights for material produced by faculty, students, and the institution and logical consequences for violation of institutional policies. Ideally, an educational institution that provides distance learning should designate an agent to respond to complaints of illegal copyright infringement or to resolve conflict of interest issues.

New Challenges, Few Answers

Legislation and accepted practice must change and adapt in order to make the most out of the possibilities of distance learning. The fairness of intellectual property law and recognition of ownership of ideas by contributors must be balanced with the necessity of access and open-ended discussions. (Chang, 1998). Without the support and confidence of distance educators in their ability to protect their rights after publishing on the Internet, asynchronous learning and web-based classes will not flourish. Faculty members already uncertain about the uses of technology will gain yet another excuse for not updating their teaching and delivery methods to accommodate the changing need of students. (Naylor, 1985) (Parrott, 1995). Guiding principles should determine the extent of digital distance learning exemptions to copyright law until binding legislation has been enacted by Congress and signed into law.

The Distance Educator's Annotated Bibliography/ Webography of Online Intellectual Property and Copyright Resources

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Bitlaw, a resource on Technology Law, lots of information, very clearly explained at: http://www.bitlaw.com/copyright/fair_use.html

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Congress of the United States of America (105th), Digital Millennium Copyright Act, final joint version of H.R. 2281, DMCA, October 20, 1998, signed into law Oct. 28, 1998 as Public Law 105-304 at:

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Copyright Bay, George Washington University graduate students developed "Copyright Bay". This site uses coastal metaphors to help teachers and faculty navigate "Fair Use Harbor" with guidelines on what can be copied or posted on-line. The site includes "Dist-Ed Point" which is very close to the dreaded "Infringement Reef" at: <http://www.nmjc.cc.nm.us/copyrightbay/coprbay.htm> (Beware broken links)

Copyright Website, The, U.S. Centric Copyright Website accents some notorious pillagers of copyright in visual, audio, and digital formats and has constantly updated information on laws as well as forms at: <http://www.benedict.com/contents.htm>

Duke University School of Law, Copyright Society of the U.S.A.; This nonprofit corporation fosters the study of copyright law in literature, music, art, the theatre, motion pictures, and other forms of intellectual property.
<http://www.law.duke.edu/copyright/index.htm>

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<http://eon.law.harvard.edu/property/syllabus/>

Holderness, Mike (1998), Moral Rights and Authors' Rights: The Keys to The Information Age at: http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/

Intellectual Property Today, This online publication with 20,000+ subscribers focuses solely on patent, trademark and copyright law. They have been called the "bible" of intellectual property law. at: <http://www.lawworks-iptoday.com/>

Intellectual Property Rights Organization, Intellectual Property Rights and Their Protection, this site from the United Kingdom provides a more global view of digital issues and links to the World Intellectual Property Organization and amongst sites at: <http://inf2.pira.co.uk/top007.htm>

Library of Congress, U.S. Copyright Legislation This site has an overview of recent

legislative changes in the copyright law, revised from the 106th Congress, with Links to DMCA introduced at the 105th Congress at:

<http://lcweb.loc.gov/copyright/penleg.html>

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<http://www.arl.org/info/frn/copy/osp.html>

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<http://www.theatlantic.com/issues/98sep/copy.htm>

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National Education Association (NEA), Center for Educational Technology, Technology Briefs, A series of Technology Briefs including, Intellectual Property Rights, and Distance Education. Discusses the lucrative business of universities that have generated millions of dollars by licensing and patenting intellectual property generated by their faculty members at: <http://www.nea.org/cet/briefs.html>

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<http://www.medialawyer.com/lec-copy.htm>

University of Texas System, Copyright for Distance Learning, very current summary of issues plus a Copyright Crash Course Tutorial at:

<http://www.utsystem.edu/OGC/IntellectualProperty/distance.htm>

University of Texas System, Sample Educational Materials Agreements including copyright use permission letters at:

<http://www.utsystem.edu/OGC/IntellectualProerty/edmatrls.htm>

The U.S. Copyright Office was created "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Constitution, Article I, Section 8)/ The official web site is at: <http://lcweb.loc.gov/copyright/>

The U.S. Copyright Office, Report on Copyright and Digital Distance Education, the entire 353 page Adobe Acrobat document can be downloaded as a PDF file at:

About the Authors:

L. Heidi Primo is currently a distance education graduate student in "Educational Technology Leadership" (ETL) through the George Washington University, living on the Big Island of Hawaii. She works full time as an Educational Specialist for the State of Hawaii teaching male and female inmates in the Hilo jail. In the past, she taught pre-primary and elementary classes in public and private schools. After completing a Master's program in "Pacific Island Studies" at University of Hawaii at Manoa, she became a full-time faculty member in the Divisions of Social Sciences and Education at the College of Micronesia-FSM in 1993. Ultimately, this led to a 3 year job in the President's Office for the National Government of the Federated States of Micronesia doing public education, policy analysis, and research as well as United Nations negotiating on the topics of Climate Change, Coastal Zone Management and Sustainable Development. Ms. Primo may be reached via email: [L. Heidi Primo <mindweave@hotmail.com>](mailto:L.HeidiPrimo@mindweave@hotmail.com)

Teresa Lesage lives in North Pole, Alaska, and recently completed the George Washington University ETL Masters Degree program as a distance learning student. She teaches second grade in a classroom that has 11 computers. She incorporates CCTV, online lessons, the Internet and HyperStudio into most of her lessons. Her 14-year old son is a competitive swimmer and one of the 16 fastest 200-meter butterfly swimmers in his age group in the nation. Her husband retired from the Navy last year, and is setting up his first classroom this year as a K-1 multi-age teacher. Ms. Lesage's email address is: [Teresa Lesage <lesage@ptialaska.net>](mailto:Teresa.Lesage@ptialaska.net)

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Editor's Note: Stephen Downes is one of the most prolific and intuitive of the distance learning gurus. His article and insights are provocative and energizing. These links on Copyright that he has provided are inclusive and well worth the visit.

Stephen Downes Copyright Links

<http://www.munimall.net/scripts/downes/links/user trolls.cgi?keyword=copyright>

Survey of Intellectual Property Issues for Distance Learning and Online Educators

Good overview discussing the application of copyright in a wide variety of education related areas. Excellent list of references and resources. By L. Heidi Primo and Teresa Lesage, July 7, 2000.

Submitted on Jan 12 2001 - 10.04

Copyright

Automated copyright clearance service for online content providers and newspapers.

Submitted on Dec 12 2000 - 08.36

The Concept of Copyright Fights for Internet Survival

Mr. Clarke and his group of programmers have deliberately set themselves on a collision course with the world's copyright laws. They express the hope that the clash over copyright enforcement in cyberspace will produce a world in which all information is freely shared. By John Markoff, New York Times, May 10, 2000.

Submitted on May 15 2000 - 08.31

A Practical guide on Copyright Clearance for Multimedia Producers

Developed by Department of Canadian Heritage Interactive Multimedia Producers Association of Canada (IMPAC), this guide is intended to remedy, at least in part, any lack of knowledge of copyright provisions and other applicable rules or of associated business practices in the multimedia field.

Submitted on Apr 11 2000 - 14.54

Judge OKs deep hyperlinking

Deep linking is not a copyright violation, judge rules. AP, March 29, 2000.

Submitted on Mar 29 2000 - 16.14

Internet Patents Are Changing The Rules

Useful overview of patent law with an eye to the spate of recent technology patents. By Jason and Ted Coombs, Byte, March 13, 2000

Submitted on Mar 20 2000 - 08.37

My Conversation with Jeff Bezos

Tim O'Reilly reports on his conversation with Amazon.Com's Jeff Bezos as a follow-up to his letter on patent abuse. Jeff: We're just going after the big guys who are going after us, the guys who are not innovating themselves but just copying us and working to crush us.

Submitted on Mar 5 2000 - 11.55

Open Source, Patents and O'Reilly

Tim O'Reilly (of O'Reilly Books) writes an open letter to Amazon.Com's Jeff Bezos regarding Amazon's abuse of the patent system.

Submitted on Mar 5 2000 - 11.50

Amazon Associates

Plan Wins Patent Protection Looks like Amazon.Com has invented commission based referrals... or it could be that the U.S. patent office has missed the boat again. By Mo Krochmal and Jason Coombs, TechWeb, 25 February 2000.

Submitted on Feb 28 2000 - 10.29

Nethics

Information and copyright resources for the online learning community.

Submitted on Feb 25 2000 - 08.34

©ontra

Interesting historical view of the copyright debate. The author writes, Other scholars have shown that the very idea of the author as owner of her words -- and even the ideas manifested in those words as property -- is not a natural human view but rather a relatively recent invention of the late eighteenth century, a convenient fiction which obscures or effaces other possibilities of writing, reading, and invention.

Submitted on Feb 10 2000 - 09.02

The Unseen ";Other ";of Intellectual Property Law

Good article debunking the myths and attacking the legalist interpretation of copyright law, focusing on the social needs - if any - served by copyright. By TyAnna K. Herrington, Kairos, Sprint, 1998.

Submitted on Feb 10 2000 - 08.59

GrokSoup

This is very interesting - a tool for making and distributing your own online news zine or weblog. Careful though - you sign away your copyright to them when you register.

Submitted on Feb 2 2000 - 08.46

Industry Group Sues MP3.com

The copyright battles continue - this time the music industry tries to stop 'beaming' - the immediate transfer of a CD once it has been purchased online.

Submitted on Jan 24 2000 - 11.41

How Patent Attorneys are Stealing Our Future

Jesse Berst gets this one right - patents and copyrights on internet technology are out of control. Anchordesk, ZDNet, January 18, 2000.

Submitted on Jan 18 2000 - 09.39

Movie Studios Sue Web Sites for Passing DVD Copying Secrets

Can copyright protection prevent you from writing software? That's the implication if these movie studios are successful in their court action. By Sherman Fridman, Newsbytes Special to the E-Commerce Times January 17, 2000.

"I was served legal papers today regarding the legality of this webiste (sic). We all know what freedom of speech is, right? Good. Because this site will NOT be taken down under ANY circumstances. I don't care if it has to move to <http://dvd-copy.ru> !!!!!!!!!!!!! Let them serve me papers in Russia!"

Submitted on Jan 18 2000 - 08.45

The Digital Object Identifier System

The Digital Object Identifier (DOI) is an identification system for intellectual property in the digital environment. Developed by the International DOI Foundation on behalf of the publishing industry, its goals are to provide a framework for managing intellectual content, link customers with publishers, facilitate electronic commerce, and enable automated copyright management.

Submitted on Dec 1 1999 - 13.31

More patent silliness...

CDNOW Wins Patent on Custom CD Process CDNOW's patent "Method and System for Remote User Controlled Manufacturing," covers the process of using the Internet to remotely select songs from a database, burn them to a compact disc or other playback media, and ship them to the customer. By Brian McWilliams, InternetNews.com, November 16, 1999

Submitted on Nov 17 1999 - 16.01

Judge to Disney: Halt on 'Go'

Another staunch defender of copyright finds itself called up on the carpet. By Elinor Abreu, The Industry Standard, November 17, 1999.

Submitted on Nov 17 1999 - 15.14

Woman sues Yahoo! claiming patent infringement

Live by the sword, die by the sword - Yahoo gets sued for patent violation. Associated Press, San Jose Mercury News, November 12, 1999.

Submitted on Nov 12 1999 - 15.22

Yahoo Patents Dynamic Page Generator

This is a bad one - Yahoo obtains a patent for customized pages. Slashdot, November 11, 1999.

Submitted on Nov 12 1999 - 10.45

Fair Use vs Fould Play

The L.A. Times and other online publications hit Free Republic - a site which posts and comments on news articles - with a copyright violation notice. This article examines the implications for commentary and investigative reporting. By Mark Gimein, Salon, November 10, 1999.

Submitted on Nov 12 1999 - 10.43

Free Education Now!

Mathieu Deflem's crusade against companies which post class notes without copyright clearance or permission.

Submitted on Nov 3 1999 - 15.12

Armed With a Web Site and Links, a Professor Takes On Lecture-Notes Companies

Guess the spin on this one: "Mathieu Deflem is a lone professor crusading against a group of Internet companies that he condemns as intruders into the private, privileged relationship between a professor and his students." By Florence Olsen, the Chronicle of Higher Education, October 6, 1999.

Submitted on Nov 3 1999 - 15.04

Universities Warn Sites Posting Class Notes

Is the commercial distribution of a student's class notes a violation of the professor's copyright? By Carl S. Kaplan, New York Times, October 22, 1999.

Submitted on Nov 3 1999 - 11.18

BitLaw

An excellent and comprehensive resource on technology law, containing over 1,800 pages on patent, copyright, trademark, and Internet legal issues.

Submitted on Oct 30 1999 - 13.53

Marketplace of Ideas:

Selling Patents Online Here's an item which could have implications sooner rather than later. A growing number of start-ups are creating Web sites for the sale of intellectual property rights. By Paul Jacobs, L.A. Times, October 25, 1999.

Submitted on Oct 25 1999 - 13.52

Amazon Sues Barnesandnoble.com For Patent Infringement

Amazon.com (Nasdaq: AMZN) filed a lawsuit yesterday against barnesandnoble.com, claiming that its 1-Click technology patent has been infringed upon. The question is - can you copyright site design? If so, I want any site which looks like mine to pay me royalties. Yeah, right. By Robert Conlin E-Commerce Times October 22, 1999

Submitted on Oct 23 1999 - 16.57

A Tale of Two Patent Strategies

Why build anything when you don't have to? Companies are beginning to focus on registering patents and copyrights and waiting for the royalties to roll in. By Bill Roberts, Electronic Business, October 1999.

Submitted on Oct 19 1999 - 10.40

High Stakes in Priceline Suit

Priceline - which obtained a business methods patent - is taking Microsoft to court for violation. How ironic. By Joanna Glasner, Wired News, October 15, 1999.

Submitted on Oct 16 1999 - 13.26

Ticketmaster:

Think Before You Link More from the deep linking debate: Ticketmaster Online-CitySearch is set to post a statement on its Web site that argues against certain types of linking. And perhaps this link violates copyright too! By Laura Rich, The Industry Standard, October 15, 1999.

Submitted on Oct 16 1999 - 13.20

Deep linking: Service or stealing?

Interesting article about the politics of deep linking and database scanning - both offshoots of the copyright and intellectual property debate. Looks at the recent court moves made by EBay and TicketMaster.

Submitted on Oct 1 1999 - 11.16

Company seeks patent on set of human genes

They may be your genes - but they may be owned by a Japanese company. A biotechnology laboratory is seeking to patent a set of about 6,000 human genes, giving that country a leg up in the race to copyright the human body. By Yomiuri Shimbun, Daily Yomuri Online, September 29, 1999.

Submitted on Sept 29 1999 - 17.01

Court limit publishers' rights to free-lancers' work

Hey, here's a copyright case where the writers win! Publishers can't include work by free-lance writers in their electronic databases without the writers' permission, an appeals court ruled. San Jose mercury News (AP), September 28, 1999.

Submitted on Sept 28 1999 - 14.53

Copyright and Distance Education

Discussion of copyright as it applies to distance education. Dated 1995, so some recent cases are missing, but still useful. University of Idaho Engineering Outreach Program.

Submitted on Sept 26 1999 - 18.53

All About Trademarks

Your one-stop resource for everything about trademark law. Laws from every state and most countries, trademarks in cyberspace, links to journals, organizations, and much much more. By Gregory H. Guillot.

Submitted on Sept 24 1999 - 10.28

Family Circus:

They Just Don't Get It Steve Outing argues that using legal action to shut down the Dysfunctional family Circus site won't work - even if it does violate copyright. F and P Interactive, September 22, 1999

Submitted on Sept 22 1999 - 12.36

MS IE5 XML not entirely pure, and what's this patent?

Don't you just get tired of this? Seems like Microsoft is now claiming to have invented XML, making exaggerated claims for Internet Explorer 5, adding 'Microsoft Only' tags, and slapping a copyright on the whole thing.

Submitted on Sept 20 1999 - 15.51

U.S. Patent and Trademark Office

The office which handles copyright issues for patents and trademarks. So far behind the times that as of this writing they are, and I quote, not yet equipped to handle general email correspondence.

Submitted on Sept 14 1999 - 11.15

Priceline.com Patent Challenged Copyright spat.

MercExchange claims to have patented the idea of letting customers set their

own prices for air travel 16 months before Priceline received its own patent. By Brian Alcorn, Wired News, 4 February 1999.

Submitted on Sept 14 1999 - 11.11

Net Overloads US Patent Agency Copyright mayhem.

The U.S. Patent office is unable to keep up with the myriad, and possibly conflicting, net patents and trademarks. By Jennifer Sullivan, Wired News, 4 May 1999.

Submitted on Sept 14 1999 - 11.07

Patent's Net Result:

Nothing? More from the abuse of copyright department: DoubleClick patents the banner ad. By Chris Oakes, Wired news, September 13, 1999.

Submitted on Sept 14 1999 - 10.57

Web Concern Gets Patent for Electronic Business Model

From the abuse of copyright department: The company, Priceline.com L.L.C. of Stamford, best known for allowing consumers to "name your own price" for airline tickets, said it would be issued United States patent No. 5,794,207 for both the method and the use of "buyer-driven commerce" from the Patent and Trademark Office. NY Times article by Peter H. Lewis, August 10, 1998.

Submitted on Sept 9 1999 - 11.04

Special Committee on Distance Education & Intellectual Property Issues

American Association of University Professors. Report on distance learning and copyright issues. Draft outlines on distance learning and copyright issues.

Submitted on Sept 2 1999 - 11.18

10 Big Myths about copyright explained

An attempt to answer common myths about copyright seen on the net and cover issues related to copyright and USENET/Internet publication. By Brad Templeton

Submitted on Aug 12 1999 - 21.29

Are You a Copyright Criminal?


Writers, designers, artists and copyright owners are becoming more aggressive, using new tactics and technologies to enforce their rights. By Dave Zielinski for presentations.com

Submitted on Aug 12 1999 - 21.26

About the Author:

Stephen Downes is well known, respected and admired within the distance learning community and beyond. Currently, he is at the University of Alberta, Academic Technologies for Learning and the Institute for Professional Development. He may be reached via email: [stephen.downes @ualberta.ca](mailto:stephen.downes@ualberta.ca)

His web address is <http://datanation.com/fallacies/downes/>



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ANNOUNCEMENT and INVITATION:

The Committee on Intellectual Property of the College Art Association (CAA), in conjunction with the National Initiative for a Networked Cultural Heritage (NINCH), wishes to announce the program for the forthcoming fifth annual Copyright Town Meeting devoted to the topic of intellectual property in academe.

Scheduled as part of the upcoming Conference of the College Art Association (Chicago, February 28-March 3; see <http://www.collegeart.org>, the Town Meeting will be held Saturday, March 3, 2001 in two sessions: 9:30-noon for presentations, and 12:30-2:00 for discussion. The sessions are open to all -- to registered conference attendees and to unregistered individuals who purchase a single-session ticket at the conference.

Detailed information about the program, attendance, the speakers, their topics and more may be found at the following location:

<http://www.pipeline.com/~rabaron/ctm/CTM.htm>

THEME:

This fifth edition of the annual NINCH/CAA Copyright Town Meeting is devoted to intellectual property that has been specifically prepared to be licensed for educational and scholarly use. It concerns the distribution of copyrighted and other materials especially crafted to meet the current and emerging needs of university artists and of art historians, among others. The presenters will be given opportunity to explain how their products can alter, improve, or re-create the methods of education and research. The speakers have been asked to discuss how their services and products specifically help fulfill educational and scholarly missions in ways that unlicensed collections typically do not or can not.

PARTICIPATING ORGANIZATIONS:

SASKIA is a traditional art-history slide resource that is working to transform its catalogue and methods from analog distribution to digital and, in the process is inventing new formats and licensing products.

AMICO is a highly regarded repository and resource of digital images for educational use. AMICO offers institutional subscriptions to its expanding library.

QUESTIA is an innovative effort to provide indexed digital access to tens of thousands of published works used in undergraduate humanities education.

Not presenting, but sitting on the Q&A panel during the second half of the program will be a representative from the Academic Image Cooperative (AIC), a unique program engaged in collecting public domain and otherwise legally unencumbered images for eventual use by art historians, among others.

In addition, Robert Panzer, the executive director of the Visual Artists Gallery Association (VAGA) will discuss his organization's role as licensing agency for artists and the means by which VAGA serves scholarly and educational interests alongside commercial ones. In addition Mr. Panzer is a member of the CAA Committee on Intellectual Property (CIP).

Finally, Tom Bower, a member of the intellectual property group of the National Museum of American History and the Committee on Intellectual Property of the College Art Association (CIP), will dissect the process by which educators and scholars request permission to publish images. The purpose of this exercise is to increase the likelihood of applicants obtaining favorable treatment and receiving the traditional benefits extended to scholars.

PARTICIPATING INDIVIDUALS:

Co-chairs: David Green (NINCH) and Robert Baron (CAA Committee on Intellectual Property)

Renate Wiedenhoef, SASKIA Cultural Documentation, Ltd.
<http://www.saskia.com>

Jennifer Trant, Executive Director, Art Museum Image Consortium (AMICO)
<http://www.amico.org>

Carol Hughes, Director of Collections Management, Questia Media, Inc.
<http://www.questia.com>

Robert Panzer, Visual Artists and Galleries Association (VAGA)
<mailto:rpanzer.vaga@erols.com>

Thomas W. Bower, Deputy Registrar, National Museum of American History, Smithsonian Institution, Washington, D. C. <http://americanhistory.si.edu>

Max Marmor, Director, Yale Art Library, for The Academic Image Cooperative (AIC), <http://www.clir.org/diglib/collections/aic.htm>

ADDITIONAL INFORMATION:

For additional information and questions contact Marta Teegan at the College Art Association (<mailto:mteegen@collegeart.org>) or Robert Baron (<mailto:robert@studiolo.org>)

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The Writings of Guy Bensusan

Many of us have followed the writings of Dr. Guy Bensusan for a long time. Others are just discovering him. He is a frequent contributor to the DEOS listserv, and freely shares his rich experience and philosophy. Over the years, Ed Journal has published a number of his articles. He has given his kind permission to publish these each month starting with his writings of about five years ago.

His philosophy and practice have continued to grow with the advent of new technology and the acceptance of distance learning as a viable and effective alternative to traditional methods of teaching. He is the master teacher, leading us into new paradigms of teaching and learning. Through these writings he will take us on a journey of exploration and discussion. He will show us how to motivate students and achieve results with anywhere-anytime collaborative learning that are the envy of most classroom teachers.

The *Bensusan Method* is enriching the lives of tens of thousands of students. Ed Journal is grateful to have Dr. Bensusan present this series of articles each month so that you, your colleagues, and your students can enjoy and benefit from his experience.

Chapter D-1

Musical Pillars --- No One Is Out

By Guy Bensusan

In developing and discussing these twelve pillars as the basis for creating a learner - and learning centered approach to teaching, I have often had some teacher who will respond, "I love what you're doing with eleven of the pillars, and I think this transformation to *Learning* is long overdue. The only place where I disagree with you, however, is in the matter of number"

The first time it happened, I explained at length that each one of the dozen pillars not only was vital, but the entire formula could not function unless every one of the pillars were part of the system. The success of each element of the system depends upon others, while the success of the entire program depends on having made changes in ALL the other academic, curricular and

methodological conditions, not just some, or many, or most, or even all-but-one. The transformation required every one of the pillars or columns --- all twelve.

It is similar to a game of musical columns rather than chairs --- only in musical columns, no one is thrown out or dropped! Everyone has a chance to develop and grow when all the elements are used. No one is excluded because he is slower, or doesn't have a computer, is too far from a library, must miss class because of work or cultural requirements of the community, and so on. The system can provide learning opportunities for all.

At the same time, you cannot change one thing in the existing system without changing another. For instance, if I decide to use class time for entering into higher levels of student interaction, then I must change the former way that I used class time for delivering information. And since I have to deliver content somehow, the students will have to get their nuts-and-bolts knowledge from the textbook, my lectures on tapes, some readings I have assigned, or whatever, in another way.

Since this step in learning the information out-of-class is a new idea, and students have had no training in selecting which course content items are more important, less important, more consequential or irrelevant facts, we must deal with that. I can't just throw these non-swimmers into the deep end of the pool -- after all, I have the wonderful rationale that I have NEVER done it that way. Instead, I have to acclimatize them, help them get ready for their next level of experience which I can do with some solid written questions which pose alternatives, their answers to which we will discuss in class -- and over the long run they will gradually learn to write for themselves through practice, while I gradually back away.

And when you get students talking about ideas, and how facts are used to build sequences that support particular interpretations, and when you explore relationships among ideas and levels, you are into new territory. The landmarks are not familiar to the students, and are hard to remember if you only do it once. So you have to keep going back again and again, revisiting the same place.

But if you always went back and did it the same way it would become boring and besides, students might think that the approach you were using was "the proper one" rather than only one way of doing it -- the path well-traveled may not go to where you want to get, so to speak.

When you keep going back by way of another less-well-traveled path, that may get you to the same place, while leading you past a different set of landmarks, opening up yet other ideas and possibilities -- which illustrates the multiplicity of paths, and take your pick. This is what I mean when I use the word "helper." I was a learner myself (and still am at 65 -- especially when it comes to all this new electronic high-tech stuff), and I know how to learn, which means that I know how to create the learner assisting devices which will help them to learn. But, if I keep doing it FOR them they will not learn to do it for themselves, which is the REAL and long-range goal. By doing that I can become a learner-helper or a learning-focused/ learner-centered teacher. Semantics, as one can clearly

see, is part of the challenge.

People ask me what I do for a living and I say I teach courses at Northern Arizona University, and their next question is, "What do you teach?" If I say students, they grimace and growl back, "Yes, but what subject?" As if the act was one of transferring what I know into their heads. And that is when I will, with great patience state, "I help students learn how to learn humanities subjects at many levels of understanding so at the end of their courses with me they will be able to carry on by themselves for the rest of their lives."

- You cannot get cooperation if there is fear that the guy you are helping will get the A you are working for
- You cannot use traditional grading without carrying forward the former arbitrary tradition and grades, rather than learning, will become emphasized
- You cannot treat all people the same because they are not the same, they need different kinds of help and encouragement

Helping learners is not a difficult thing to do once one learns how and can leave behind a goodly part of the heavy rocks, antiquated baggage and outmoded tapes from prior lives that we carry around. There is much to think about at first, but it gets easier as you go along. After all, there were:

- Three Blind Mice,
- Four Horsemen of the Apocalypse,
- Five Civilized Tribes,
- Seven Wonders of the Ancient World, and
- Ten Commandments, but there are
- Twelve Pillars of Learning that must be heeded, because if they are not, learning will not take place as well or as fully, and we may perpetuate the same old stuff in the classroom until the universities collapse from dilapidation of the professoriate.

E-1

The Emotional Side of Learning

By Guy Bensusan

Genuine learning is not a neutral act and it has many consequences. As we learn, we change, and pass through doorways into one room after another in a huge mansion whole totality we cannot, and perhaps will not ever be able fully to see. We can imagine it, and I have done that enough times in my life, and then with the passage of time found out that what I imagined was both very incomplete and highly misleading. Believing what I had imagined, I would have actually perceived what I had believed for a while -- but then the reality would sink in as my paradigm shifted, just as in an Escher or a Magritte painting.

When you get to the new place and begin to feel some understanding of the shifts you have gone through, you wonder why it took so long to see the obvious. This feeling of coming to perceive the innate reluctance of the human

to let go of security blankets, of the fact that the *revolutionary you* whom you believed was wide open to every experience, was in truth just as halting and timorous as others, and that you have no genuine reason to brag about being out front -- these elements can perhaps warrant your being patient with others who may be struggling to overcome their own deep, inner concerns.

And life is not and will not be exactly the same in this new place. What one learned before now is augmented, altered, perceived in a different manner, suffused with another type of light and simplified by simultaneously becoming more complex. That is, if one can leave old conditionings behind, one can seek to appraise new edifices with new measuring devices, and can shift out of mindsets that belonged to a former situation and accept newer ways of thinking, being, working, becoming and estimating worth and value.

It is difficult to do this without engaging in some sort of transition which carries with it a great deal of anxiety, loss of security in having familiar landmarks to navigate by and concern about the future based on how the past was perceived. In some ways it is like going to a foreign nation where the language is different and the foods are not recognizable and simple acts of kindness one used to perform in the old country now are irrelevant, out-of-place, or obscene -- which puts you in a terrible position because that was not your intention. As commonly stated in our era of change, "The future is certainly not what it used to be!"

Thus, as a teacher as well as student, the entry into this new world is fraught with uneasiness as we:

- incorporate the old emotional side of learning
- plus also the new tools, the sense of changing, and the security of tests, grades, and accumulating points
- The teacher also experiences challenges and critiques from colleagues, facing uncertainty about the results of experiments that conflict with their training as scholars and the security of a definite roadmap

There is plenty to frighten us -- we have our own inertia and brakes; then there are the cautionary lights in others; then there are the hucksters who are trying to sell us the stars (formerly the moon). then there are our peers who caution us, then there is the system which gives us all the reasons in the world for not going ahead. There is also the school of hard knocks that punches us hard every time we get out of line. There are our bosses who pick away at us with slights and sneers, who appropriate our ideas as their own.

But deep inside may be the worst of all – self-doubt, indecision, frustration, impatience, and demoralization.

F-1

Problems with Traditional Teaching and Learning

By Guy Bensusan


The number of alternatives are limited only by the creativity of the teacher who wants to find ways to get students extensively involved in the actual materials through their minds and mouths, not just their ears and note-taking! The point is basic: "he who doeth the work, learneth the lesson." That is why it is important (1) for the teacher not to lecture and (2) for the students to play with the information and its meanings. When the teacher prepares his lecture, writes it out and then delivers it, that teacher has engaged in three separate handlings of the material, thus reinforcing his or her learning of it solidly.

Meanwhile, the students, only hearing what is being said, are learning very little because they receiving the information only through one channel, and also have to receive it at the pace of the provider and not at their own best rate of acquisition. Moreover, they are not receiving for learning but rather receiving for recording in order that learning will take place later on. Here is another deterrent; the students are listening selectively to discern what is "important" -- meaning, what will be on the test. They are writing as fast as they can, transcribing the data for a future rapid learning session just prior to the test, after which the file will either be saved for a later exam or deleted, depending on how the teacher tests. This commentary, by the way, has been gathered in discussions with students, and is not purely the sarcastic view of this author.

These discussions have revealed another perception by students. Many of them say they feel their teachers are usually much more concerned with giving out information than with helping in the learning process. They give as evidence that they are doing their jobs. Students are not allowed to ask questions and pursue additional interpretations or levels of meaning, and most teachers will insist on one particular way of explaining the data to the normal exclusion of all others. They also cite many cases of actual harassment and reprisal against students, including themselves, who have pressed the teacher for a laying-out of all of the schools of thought on various content matters.

These conditions evoke frustration in students, who begin to perceive the act of taking notes and feeding back what the professors wants on the test as a ritual paying of dues that will result in the institution bestowing upon them their "union card" which will authorize their entry into the world of higher-paying jobs. Naturally, discussions with teachers reveal another side of the story, but regardless of who is right in this, what is clear is that some great learning opportunities are being lost and that many students think they are not getting what they are paying for. Increasingly, students are taking the matter more seriously -- and sometimes to court.

Initial faculty reaction to these suggestions has often resulted in two negative responses, which I have been told on many occasions: one says, "The students will not work on their own. These kids would rather party. Some of them come to class hung over and sleep. The only way I can be sure that they have at least *heard* the information is for me to take roll, and then give them my lecture." The other is, "I am much too busy with committees, university business, and the need to publish in order to get promoted, to prepare these lecture on videotape. And besides, what is to prevent people from stealing my ideas once they are on video and audiotape and then putting me out of a job? I see no incentive for me to change what I am doing now, and the university



certainly is not leading the way here. This system worked for me and it can work for these kids." It should be stated that these are some voices, not all of them.

But the overt words lead us to the basic nature of creating changes in behavior as well as the perils of power. Yes, we can force students to function out of fear, and since they want to pass and graduate, many of them will do exactly what they must to get by. But I assume we seek to help learners find something of value and enjoyment rather than function on the coercive level.

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May	State, Interstate and Global Distance Learning Networks: Video and Internet	Online	April 9	April 13
June	Learning at a Distance from the Viewpoint of Teachers and Students	Online	May 7	May 11
July	Internet Sampler and Primer	Online	June 4	June 8
August	Distance Learning in Business and Industry	Online	July 9	July 13
September	USDLA Annual Report	Online	August 6	August 10
October	Courses and Courseware for Training and Education	Online	September 3	September 7
November	Overview - National Trends in Distance Learning	Online	October 8	October 12
December	USDLA FISCAL YEAR 2001 ACCOMPLISHMENTS	Online	November 5	November 9

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THE STATE EXCHANGE

State Chapters and individuals are encouraged to share information about current activities, proposed legislation, successes and caveats experienced by members of USDLA State Chapters. This will be published in a section of the USDLA web page called THE STATE EXCHANGE. Readers who are not members of State or National USDLA are also encouraged to contribute.

TECHNOLOGY EDUCATION EXCHANGE

This section will highlight existing and proposed new partnerships and models for active collaboration between communications industries and education, local, state, or national, K-graduate school. It will reference new technologies that hold exceptional promise in meeting the needs of school and training environments. If you are working with technologies that you would like us to review for inclusion in TECHNOLOGY EDUCATION EXCHANGE, either as a manufacturer or user, please send information and press releases to the address above.

CALL FOR PAPERS

These official publications of the United States Distance Learning Association are interested in research, studies, policy frameworks and analysis in the areas of electronically-mediated distance learning and teaching, curriculum design, distance learning technology, administration of distance education, and related policy and institutional change. ED Journal is a refereed journal published online monthly. Ed Magazine is directed towards exchange of information, new technologies and a more general approach to Distance and Open learning. An interdisciplinary panel specializing in distance education will review all submissions.

Submission

Article submissions are usually from 2,000 to 5,000 words in length. However, 12,000 word articles based on extensive research, in-depth studies or literature surveys are often published. The material submitted should conform to APA standards.

If possible, include camera-ready art or high quality laser prints of all charts and graphs. It may be possible to recreate the charts if necessary from data submitted. Photos may be used if it is possible to incorporate them within the online publication. It is possible to fax in graphs to be re-created by our graphic artist. If you wish to include pictures/photos, please submit a print via EMAIL using .BMP or TIF.

An article may be submitted in electronic form, either by online file transfer (email or attachment) or by disk in ASCII Text, Rich Text Format, or as a Word

file. Please send one printed copy with the disk.
Please include a brief biography of the author or authors, mailing addresses,
and email/phone contact numbers.

Contact Info:

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